Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

SAM and MARIA CARDIELLO,

Petitioners,

v.

THE MONEY STORE, INC., TMS MORTGAGE, INC., and THE MONEY STORE/EMPIRE STATE INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

1. Does the language in §2605(e)(2) of the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. §2605, prohibiting a lender from "taking any action" before it responds to a borrower's claim that an error has been made in his account prohibit only "significant action" like commencing foreclosure, allowing the lender to send collection letters threatening foreclosure before investigating whether the amount demanded is not in fact owed?

2. Are actual damages a prerequisite to bringing a cause of action under 12 U.S.C. §2605(f) of RESPA?

3. Does a borrower state a cause of action under Truth In Lending Act ("TILA"), 15 U.S.C. §1601 et. seq. when it alleges that a lender has intentionally attempted to and in fact collected finance charges in excess of those disclosed or owed on a loan?

4. Does TILA's one-year Statute of Limitations bar a claim that the lender fraudulently attempted to and in fact collected finance charges in excess of those disclosed at the maturity of the loan?

5. Does equitable tolling require a specific allegation that the lender took actions in an attempt to fraudulently conceal borrower's cause of action, even if the record contains no evidence that the violation complained of could have been discovered earlier?

6. Did the Second Circuit substantially depart from the accepted and usual course of judicial proceedings ?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

No. ____

SAM CARDIELLO and MARIA CARDIELLO, on behalf of themselves and all others similarly situated,
Petitioners

-against -

THE MONEY STORE, TMS MORTGAGE, INC, and THE MONEY STORE/EMPIRE STATE INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI

Sam and Maria Cardiello respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-2a) is not reported. The opinion of the District Court (App.3a-19a) is not currently reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2000. Petitioner filed a motion for reconsideration, which was denied by the Second Circuit on June 11, 2002. (App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2605 of the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. § 2605 (App. 49a); Sections 1638, 1640 and 1666d of the Truth in Lending Act, 15 U.S.C. §§ 1638, 1640 and 1666d (App. 58a, 63a, 69a); and Section 226.21 of Regulation Z, 12 CFR 226.21 (App., 70a) are set forth in the appendix.

STATEMENT OF THE CASE

At issue in this case are several sweeping holdings which dramatically limit the reach of the protections Congress afforded to borrowers in TILA and RESPA, findings which are in direct conflict with the plain language of both statutes, with well-settled precedent from this and other courts, and with regulations implemented by the Federal Reserve Board.

Thus, via its Summary Affirmance, the Second Circuit held that, in prohibiting a lender from *"taking any action"* until it investigates a Borrower's claim that thousands of dollars demanded by the lender are not owed, RESPA only intended to prohibit "significant action," and permitted lenders to send out letters threatening foreclosure before investigating whether the amount is actually owed. No authority whatsoever was cited for this conclusion, which directly conflicts with both Congress' and this Court's interpretation of identical statutory language in TILA from which the RESPA provision was modeled.

The Second Circuit also held that, "even assuming defendants had failed to comply with RESPA §2605 in some technical respect", the RESPA claim fails because Petitioners "have suffered no damages." (App. 15a) Apart from the fact that Petitioners did allege damages, introducing an actual damage requirement in RESPA directly conflicts with the statutory damage remedy afforded by Congress, and indeed represents the first case under any of the federal statutes

regulating the lender-borrower relationship in which damages were held a prerequisite to suit.

With regard to TILA, the decision below holds that at the conclusion of a multiyear mortgage Loan, a lender may attempt to collect thousands of dollars in excess of the total amount TILA required the lender to accurately disclose at the outset of the Loan without fear of any TILA liability. According to the Court, even where a lender deliberately collects amounts in excess of those owed and originally disclosed, "TILA claims for inaccurate disclosure statements accrue at the time the loans are made, *not upon each payment inconsistent with the statement's terms.*" (App. 11a (emphasis added))

Moreover, though recognizing that TILA's one-year Statute of Limitations is subject to equitable tolling, the Court below concludes that to even invoke the equitable doctrine, a borrower must allege specific actions taken by the lender in the Mortgage's *first year* to conceal its intent to collect more than the finance charge disclosed *at the Loan's conclusion*. According to the decision appealed from, absent the ability to make such allegations – of if the Lender doesn't effectuate its plan to collect more than the amount originally disclosed until after the Loan's first year – "any questions concerning the nature of defendants' acts [at the loan's maturity] are moot."(App. 11a)[1]

As shown below, the Court's conclusion that equitable tolling requires affirmative concealment directly conflicts with well-settled case law from this Court and every federal circuit court. Moreover, the conclusion that lenders may demand "payments inconsistent with the [Disclosure] statement's terms" after a Loan's first year without violating TILA ignores abundant authority which demonstrates that Congress in no way intended to limit the protections afforded by TILA to a single year.

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[1] The "App. _" refers to documents annexed in Petitioner's Appendix, while "R." refers to documents in the record below.

Wholly apart from these holdings, the manner in which the Court reached its conclusions represents a clear departure from "the accepted and usual course of judicial proceedings." In reaching its decision, the Court below violated virtually every procedural rule governing a Rule 12(b)(6) motion to dismiss by: (1) premising its decision on defenses which were neither raised in nor decided by the District Court; (2) relying on matters outside the pleadings without converting the motion to summary judgment; (3) crediting "facts" which were not supported by evidence and which were patently improper subjects for Judicial Notice; and (4) ignoring the rule that a court reviewing a Rule 12(b)(6) dismissal must assume the truth of the facts alleged in the complaint.

As a result of these errors, Petitioners were completely denied their fundamental right to present the legal arguments and evidence they had in support of their federal claims for relief.

The Facts

Petitioners took out a mortgage loan with the Money Store in 1985. Pursuant to TILA, Money Store provided the Petitioners with a TILA disclosure statement in which they were required to accurately disclose the Finance Charge and Total of Payments the Petitioners would make assuming they made their payments on time. As the Disclosure Statement stated, late monthly payments "would increase the finance charge and total of payments, [while] *early payment will decrease them.*" (App. 4a)

The Petitioners made timely payments; indeed, as the Money Store's own documents will demonstrate, over four hundred days *early* over the course of the Loan, which should have entitled the Petitioners to a substantial rebate. Despite this, in January 2000, Money Store notified the Petitioners that, at the May 2000 maturity of the Loan, they would owe an additional $2,157 above the amount originally disclosed. (App. 4a) To explain this discrepancy, the Money Store asserted that the Petitioners had paid late, a claim that

– as Petitioners repeatedly alleged in their Complaint – Money Store knew to be patently false. (App. 5a)[2]

The Petitioners spent five months trying to convince Money Store that no additional amounts were owed, to no avail. After Money Store sent two additional demand letters and began assessing interest on the disputed amount in May 2000, the Petitioners were forced to hire an attorney, who wrote Money Store on June 8, 2000, demanding an explanation and accurate recalculation of the Loan. (App. 5a)

Despite the Attorney's letter, on June 13, 2000, the Money Store delivered a letter to plaintiff's counsel "that demanded payment of $2,157.16 in unpaid principal and $56.56 in interest." (App. 5a) One week later, Money Store again wrote Petitioner, advising them that unless they immediately paid $2,249, the Money Store would "invoke any and all remedies. . . including foreclosure sale of the property," and concluded by stating that "the matters discussed herein are of extreme importance." (App. 5a).

By letter dated June 28, 2000, Money Store finally responded to Petitioners' claim that the amount demanded was never in fact owed, repeating the false claim that the purported "balance" was legitimately due because Petitioners failed to make timely payments under the Loan. (App. 5a). Despite this, Money Store stated that while they were "under no obligation to do so", they would recalculate Petitioners' payments "in the interest of fostering amicable customer relations", and were now only demanding $163.21 more than the amount originally disclosed. (App. 6a).

The letter also contended that Petitioners had been the beneficiary of a settlement between Money Store and the FTC in 1992 based on improper interest calculations made in

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[2] See, e.g., Complaint, P 28 ("though its error was or should have been obvious to Money Store . . . Money Store continued to insist that Plaintiffs owed amounts in addition to those set forth on the Disclosure Statement")

the accounts of almost 10,000 Money Store borrowers. According to the 1992 FTC Complaint, Money Store had engaged in a deliberate pattern of demanding excess interest at the conclusion of Loans, a practice similar to what it was now attempting to do to Petitioners:

> In the course of extending consumer credit, [Money Store] . . . has failed to properly disclose the payment schedule as required by [TILA]. For example, [Money Store] has disclosed a monthly payment computed using the 360/360 method . . . although it frequently amortize[s] loans using the 365/360 method. *As a result, the disclosed payments are insufficient to fully repay the extension of credit in the time period disclosed, and greater payments would be required to repay the credit extension.* (R.39 (emphasis added)).

After receiving Money Store's June 28th letter, Petitioners sought further information about the $163.21 allegedly still owed, and substantiation of Money Store' claim that Petitioners had been notified of the 1992 FTC Settlement. In response, Money Store replied that they could not accommodate the request because of "the unfortunate destruction of the physical records of the settlement accords." (R. 52).[3] Shortly thereafter – and in a complete about-face – Money Store notified Petitioners that, "in the interest of amicable customer relations," they had agreed to "waive the remaining balance" on the Loan. (R. 52-53)

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[3] This despite the fact that the FTC Settlement required Money Store to "maintain and upon request make available . . . all records that will demonstrate compliance with the requirements of [FTC] order." (R. 34) In a sworn affidavit to the FTC, Money Store's President represented that Money Store would maintain "all records that will demonstrate" such compliance. (R. 45)

Despite this so-called "waiver," Money Store still has not compensated Petitioners for the substantial *reduction* in payments they were entitled to – and which should have been calculated in Petitioners' account in the first instance – because of Petitioners' early payments over the course of the Loan.

Proceedings Below

In September 2000, the Petitioners commenced the instant class-action lawsuit, alleging (1) that the Money Store's repeated and ultimately successful attempts to collect more than the finance charge disclosed at the conclusion of the Loan violated both TILA and Regulation Z, and (2) that the Money Store's threats to foreclose after receiving the letter from Petitioner's attorney violated RESPA's requirement that the lender not "take any action with respect to" a borrower's inquiry until it has investigated and responded to the claimed error.

The District Court dismissed these claims pursuant to Rule 12(b)(6). First, the Court found that Petitioner's TILA claims were time-barred because TILA's one-year statute of limitations expires in the year following consummation of the loan, even if – as Petitioners allege happened here – the lender subsequently demands "payment inconsistent with the [Disclosure] Statement's terms." (App. 11a) According to the District Court:

> Taken together, plaintiffs' arguments reflect a basic misunderstanding about the breadth of TILA's application. . . [TILA's requirements] deal almost exclusively with the time leading up to and including the loan transaction itself. The one-year statute of limitations, paucity of provisions dealing with events after the requisite disclosures, and explicit language of 15 USC §1634 only provide further evidence of Congress intent not to extend TILA liability far beyond the loan transaction itself. (App. 12a)

Though the Court recognized that TILA's limitations period is subject to equitable tolling, the District Court found that Petitioners had raised no basis for asserting the doctrine, since the "sine qua non" of equitable tolling "is that the defendant fraudulently concealed from the plaintiff his cause of action. . . ." (App. 10a) The Court concluded:

> [T]he Complaint does not allege that Money Store committed any act of fraud towards Petitioners or, indeed, *any act whatsoever* during the year following the disclosure statement. Thus, equitable tolling does not apply and any questions concerning the nature of Money Store' acts in the year 2000 are moot. (App. 11a (emphasis in original))

On the RESPA claim, the District Court held that Congress did not intend §2605(e)'s prohibition against "taking any action with respect to the inquiry of the borrower" to apply to correspondence such as a foreclosure threat, but rather meant "some significant action" such as "commencing foreclosure proceedings against the borrower or suing the borrower." (App. 16a)[4] According to the Court, reading the "before taking any action" language to mean that lenders cannot send out letters threatening foreclosure before investigating a claim that the amount demanded is not in fact owed

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[4] As the District Court acknowledged in a subsequent Order "clarifying [its] opinion" (See App. 46a), Money Store never made this argument in its motion, which was raised for the first time in the Court's Opinion. Defending its dismissal of a part of Petitioner's RESPA cause of action which was not challenged in Money Store's motion, the subsequent Order said that "a court does not act *sua sponte* when it independently engages in analysis or proposes arguments on issues raised in the motion before it." (App. 46a) *But see, United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("the rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance . . . distinguishes our adversarial system of justice from the inquisitorial one").

> "would create a *needless technical obstacle unrelated to the statute's objectives.* In the absence of any indication Congress intended this expansive reading, we will not find it." (App. 16a (Emphasis added)

In any event, the Court further found that "even assuming plaintiffs could allege that defendants had failed to comply with RESPA §2605 in some technical respect, plaintiffs appear to have suffered no damages." (App. 15a) As with its construction of §2605(e)(2), the conclusion that RESPA requires victimized borrowers to suffer actual damages was unaccompanied by any case authority.

On appeal, the Second Circuit affirmed dismissal of the TILA and RESPA claims by Summary Order "for the reasons stated in Judge Buchwald's Memorandum." (App. 1a) Moreover, reaching an issue never raised or addressed below, the Court concluded that the Cardiello's TILA "claim fails on the merits; they have not demonstrated that Appellees violated TILA." (App. 1a-2a) No authority was cited for this *sua sponte* holding, although the transcript of oral argument (App. 22a) indicates that – notwithstanding both Petitioners and *Money Store's* allegations to the contrary[5] – the Court viewed Money Store's attempt to collect additional Finance Charges as a simple mistake which would not be actionable under TILA:

> JUDGE KEITH: What's the fraud here? . . . They made a mistake, and . . . did not the Money Store tell your clients look, you were late paying over a certain period of time and this is what happens?

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[5] Money Store never claimed that it had made a mistake; indeed, in an affidavit in support of its Motion for Dismissal, Money Store's General Counsel continued to insist that "plaintiffs owed additional monies *because they had failed to make their payments when due.*" (R. 55, P 3 (emphasis added))

> MR. GROBMAN: That's a lie, Your Honor. That is our contention. That is –
>
> JUDGE MCLAUGHLIN: It's a mistake. It's a mistake.
>
> MR. GROBMAN: No. It is not. It is not a mistake. . . How did we know that we paid four hundred days early? Because we looked at the checks which had been canceled by their bank. . . . TILA is not supposed to allow this. Section 1640(b) of TILA says that –
>
> JUDGE MCLAUGHLIN: You can't make a mistake.
>
> (App 30a)[6]

As Petitioners advised the Second Circuit in a post-argument submission addressing issues first raised by the court at oral argument, TILA ***does not*** allow a lender to make a mistake, unless it can "show by a preponderance of evidence" that "the violation was not intentional ***and*** resulted from a bona fide error *notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.*" 15 U.S.C. §1640(c) (emphasis added) Here, Money Store did not even acknowledge that it made an error in the Petitioners' account, much less demonstrate that

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[6] The Court repeatedly returned to the theme that the Money Store's assertion that Petitioner's had paid late and therefore owed thousands of additional dollars was an inadvertent and nonactionable error. See App. 27a (Judge Mclaughlin: "Wouldn't the easiest interpretation be that some accountant had screwed up?"); App. 32a (Judge Keith: "You keep using the word fraud. Couldn't this have just have been a mistake?") App. 32a (Judge Mclaughlin: "The company thought they did pay late." Mr. Grobman: "They can't think it . . . based on their own documents." Judge Mclaughlin: "They're misreading their own documents.")

it has procedures in place to prevent such errors from occurring in the first place.

REASONS FOR GRANTING THE PETITION

In a letter dated March 19, 2002, counsel for Money Store requested that the District Court publish the decision affirmed by the Second Court, "since we believe that your Honor's decision has significant precedential importance."

Counsel is right. By the affirmed decision – and despite the absence of any meaningful statutory analysis – the Court below has gutted key components of both RESPA and TILA, giving lenders a green light to routinely communicate threats to mortgage borrowers in an effort to coerce them to pay amounts which are not even owed.

THE LOWER COURT'S CONSTRUCTION OF RESPA DIRECTLY CONFLICTS WITH THE INTERPRETATION GIVEN THE SAME LANGUAGE BY CONGRESS AND THIS COURT

A. RESPA's Prohibition Against the Lender "Taking Any Action With Respect to the Inquiry"

RESPA § 2605(e)(2) states in relevant part that, not later than 60 days after receiving a letter from a borrower claiming that his account is in error, and *"before taking any action with respect to the inquiry of the borrower*, the servicer shall –

> (A) make appropriate corrections in the account of the borrower . . . and transmit written notification of such correction . . . [or]
>
> (B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes . . . a statement

> of the reasons for which the servicer believes that the account of the borrower is correct . . . ." (12 U.S.C. § 2605(e)(2))

In this case, the Second Circuit affirmed the lower court's holding that Congress did not intend the "before taking any action" language contained in §2605 to preclude lenders from sending out foreclosure letters before investigating whether the amount demanded was in fact owed. According to the Court, in using this language, Congress really meant to prohibit what the opinion characterized as "some *significant*" or "adverse action", which the Court said "would include commencing foreclosure proceedings against the borrower or suing the borrower." (App. 16a)

With all due respect, the Court's interpretation of RESPA arises literally out of thin air: (i) the Court below cited no authority whatsoever in support of its conclusion; (ii) the Court failed to engage in any analysis – none – of the specific statutory language at issue; (iii) the Court completely ignored a Supreme Court case interpreting identical language from TILA §1666 as prohibiting lenders from making "any attempt" to collect a disputed amount.

Thus, as Petitioners pointed out, RESPA §2605(e)(2) is virtually identical to TILA §1666 in language and in purpose,[7] and §1666 specifically includes the "taking any action" language at issue here. As this Court has stated, the "similarity of language" employed in statutes "is a strong indication that the two statutes should be interpreted *pari passu*," especially where "the two provisions share a

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[7] As the District Court found, "RESPA's basis purpose is to protect borrowers from exploitation by lenders", (App. 16a), while Congress enacted TILA to prevent "unscrupulous lenders [from] taking advantage of consumers through fraudulent or otherwise confusing practices." *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3rd Cir. 1998).

common raison d'etre." *Northcross v. Bd. Of Education*, 412 U.S. 427, 428 (1973)

As Petitioners pointed out, the Supreme Court has characterized the requirements imposed by the "prior to taking any action" language in §1666 in terms which are directly in conflict with the lower court's interpretation of the identical statutory language here:

> The creditor must send its explanation ***before making any attempt*** *to collect the disputed amount.*

American Express Co. v. Koerner, 452 U.S. 233, 237 (1981) (emphasis added)[8]

Moreover, the Senate Report to §1666 demonstrates that – far from "a needless technical obstacle" which Congress could not have intended – preventing lenders from sending out collection letters until alleged errors have been fully investigated was one of the legislation's central goals:

> Most consumer complaints about billing errors involve a common pattern. In a typical case, the consumer might discover a billing error in one of his monthly . . . statements. He writes to the creditor but receives no satisfactory response. *In the meantime, he receives a series of computer written dunning letters.* These letters may threaten the consumer with a bad credit rating or other legal action unless the amount in dispute is paid. After literally months or years of

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[8] Section 2605(e) was enacted a decade after *Koerner*, and apparently modeled after the simlir provision in TILA §1666. "Where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

> carrying on correspondence with a computer, many consumers give up in frustration and pay the disputed amount even though they feel they do not owe such amounts. . . . A few hire attorneys to press their claim. One consumer witness . . . told of spending $150 in legal fees to get a $22 billing error corrected.

(Report of the Committee on Banking, Senate Report No. 93-78, p. 5 (emphasis added))

To prevent these abuses, Congress stated that "*Creditors cannot send dunning letters* . . . or take other action to collect a disputed amount . . . until the creditor has complied with the requirements for resolving billing inquiries." (Sen. Rep. No. 93-278, p. 2 (emphasis added)) Thus, in finding that Congress did not mean to prohibit lenders from sending collection letters before investigating whether the amount was actually owed, the Second Circuit's construction of RESPA's "before taking any action" language is completely at odds with the same language in TILA as interpreted by both Congress and this Court.

Moreover, interpreting RESPA's "before taking *any* action" language as really requiring "some significant action" ignores the words used by Congress. As courts have routinely found, the word 'any' when employed in a statute "is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." *Barseback Kraft AB v. U.S.*, 121 F.3d 1475, 1481 (Fed. Cir. 1997). Indeed, interpreting the word 'any', this Court has specifically stated that "Congress' choice of the language '*any* damage' and 'liability of *any* kind'. . . . undercuts a narrow construction." *U.S. v. James*, 478 U.S. 597, 605 (1986) (emphasis in original).[9]

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[9] That Congress did not intend to limit "action" to the institution of litigation is also shown by its meaning elsewhere in §2605(e). "[I]dentical words used in different parts of the same act are intended to have the same

"When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *James*, 478 U.S. at 606. The lower court did not even claim to find an ambiguity in the statutory language at issue – indeed, conducted no textual analysis of the language at all. Nor did it mention – much less distinguish – any of the cited authority as to what Congress meant when it prohibited lenders from "taking any action", nor cite any authority of its own.

In sum, when these authorities are considered, the correct conclusion seems almost beyond question. Thus, in both its analysis and conclusion, the construction of RESPA affirmed by the Second Circuit appears to significantly diverge from Congress' intent in enacting §2605(e)(2).

The court's RESPA construction has implications for millions of mortgage borrowers who are not covered by §1666 of TILA . As the District Court acknowledged, "a great deal of correspondence from consumer lenders is standardized, computer generated notices that are routinely issued with little or no individual review."(App. 16a) [10] As a result of its statutory construction, the decision below frees lenders to engage in high-pressure collection tactics against borrowers to coerce payment of amounts which may not even be owed. No other court has reached such a conclusion, which – as the Senate Report of §1666 illustrates – will lead many borrowers

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meaning." *U.S. Nat. Bank of Ore. v. Ind. Ins. Agents*, 508 U.S. 439, 460 (1993). Congress used "action" elsewhere in §2605(e) to set forth the "action" a lender must take – i.e., providing written *responses* to a borrower's request for information. Thus, §2605(e)(1) requires a lender to acknowledge receipt of a letter from the borrower requesting information within 20 days "unless *the action* requested [i.e., providing the information] is taken within such period." Moreover, §2605(e)(2) – the provision at issue – is titled "*Action* with respect to the Inquiry of the Borrower", advising the lender that the "action" it must take is to *write* the borrower within 60 days with an answer to the borrower's inquiry.

[10] Indeed, as of August 2001, Money Store alone had over 500,000 loans outstanding. Charlotte Business Journal, August 20, 2001.

to simply pay the disputed amount rather than incur the additional risk and expense of fighting the improper threat of foreclosure.

B. The Conclusion That RESPA Requires Actual Damages

The Second Circuit also affirmed the finding that, even if Money Store "failed to comply with RESPA §2605 in some technical respect", the Petitioners could not bring a RESPA claim "because they appear to have suffered no damages – the entire balance of the loan was waived." (App. 15a). According to the court, "elevating routine [balance due demand] notices to statutory violation[s] in the absence of any harm is wholly unwarranted." (App. 16a).

Again, the court failed to engage in any analysis of the statutory provision at issue – none. Had the court considered §2605(f) of RESPA, it would have determined what every other court analyzing this and similar damage statutes have found: that RESPA does not require actual damages, though the Petitioners do allege damages here.

Section §2605(f) of RESPA states in relevant part:

> Whoever fails to comply with any provision of this section shall be liable . . . in the following amounts:
>
> . . . In the case of an action by an individual, an amount equal to the sum of-
>
> (A) any actual damages to the borrower as a result of the failure; and
>
> (B) *any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section.* . . . 12 U.S.C. §2605(f) (emphasis added)

Thus, even if the Petitioners had not alleged actual damages compensable under RESPA – which they did [11] – the decision fails to acknowledge, much less address, RESPA's authorization of *statutory damages* where a party alleges a "pattern or practice of noncompliance," as the Petitioners have here.

Courts analyzing §2605(f) of RESPA and similar language in TILA and the Truth in Savings Act ("TISA") have uniformly held that no actual damages need be alleged to recover statutory damages. *Schnall v. Amboy National Bank*, 279 F.3d 205 (3rd Cir. 2002) (TISA); *McDonald v. Washington Mutual Bank*, 2000 WL 967994 (N.D. Ill. 2000) (RESPA); *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 126 (2nd Cir. 1983) (TILA). As the Fifth Circuit stated with regard to the purpose behind TILA's virtually identical damages provision, statutory damages are afforded "as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist." *Perrone v. GMAC*, 232 F.3d 433, 436 (5th Cir. 2000)

The lower court's holding directly conflicts with these cases. Indeed, to the best of Counsel's knowledge, this presents the first case under any of the federal statutes regulating the lender-borrower relationship in which a court has determined that actual damages are a prerequisite to recovery of a statutory damage remedy expressly afforded by Congress.

C. The Conclusion that RESPA Does Not Require A Lender To Acknowledge Its Error

Finally, this case presents the issue of whether RESPA allows a Lender to refuse to admit its error in

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[11] As the Petitioners pointed out, they did suffer damages as a result of the RESPA violation, which forced them to hire an attorney and incur other expenses following the Money Store's threat of foreclosure, each of which are compensable under RESPA. *Cortez v. Keystone Bank, Inc.*, 2000 WL 53666 (E.D. Pa. 2000)

demanding thousands of dollars which were not in fact owed if – six months after the borrower's initial complaint and after it threatens the borrower with foreclosure – the Lender "waives" payment as a purported accommodation to the borrower.

The court below answered yes, finding that

> "far more important than . . . technical compliance [with RESPA] is the bottom line: defendant waived the balance of plaintiffs' loan. ...Since it is difficult to imagine a greater accommodation than forgiving the entire amount of a loan in dispute, it strikes this Court that defendants went far beyond what was required of them under RESPA §2605. Certainly, they did not violate it. (App. 15a)

As Petitioners have repeatedly stated, Money Store did not "waive" the balance of plaintiff's loan, and in fact still owes the Cardiello's a substantial rebate because of their 400-day early payment of the mortgage obligation. But even if this conclusion was correct, Petitioners submit that §2605 of RESPA serves a far larger purpose than an adjustment in the account of a single individual borrower.

RESPA §2605(e) requires the Loan Servicer to "conduct[] an investigation" of a claim of error, which "is intended to preclude pro forma replies which simply assert that the amount billed is correct." (Sen. Rep. to TILA §1666, p. 22) Once an error is found, both TILA §1640(b) and RESPA §2605(f) require the Lender to acknowledge its mistake and to correct not only the account of the borrower who brought it to the Lender's attention, but the accounts of other similarly-situated borrowers. This is evident from TILA §1640(b) which – like RESPA §2605(f) – states that creditors shall not be liable for errors in disclosure if:

> "within sixty days after discovering an error, whether pursuant to a final examination report . . . or through the creditor's own procedures, and *prior to . . . the receipt of written notice of the error from the obligor*, the creditor *notifies the person concerned of the error* and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of . . . the dollar equivalent of the annual percentage rate actually disclosed ." (15 U.S.C. §1640(b) (emphasis added))

Thus, a Lender's acknowledgment of its error is far from the mere academic exercise suggested in the lower court's decision, but instead an essential part of RESPA and TILA's statutory framework. See 12 U.S.C. §2605(f)(4) (no liability for error under RESPA if "the servicer *notifies the person concerned of the error* and makes whatever adjustments are necessary in the appropriate account . . ."). Here, Petitioners have alleged that Money Store engaged in a pattern and practice of "knowingly and/or recklessly misrepresent[ing] the correct amount owed by" borrowers. (Comp., P 3) Moreover, because Money Store not only refuses to admit its error but continues to fraudulently maintain in sworn affidavits that "plaintiffs owed additional monies because they had failed to make their payments when due" (R. 55), similar errors in the accounts of tens of thousands of other borrowers remain uncorrected.

Disregarding RESPA and TILA's requirement that the creditor "notif[y] the person concerned of the error," the decision below imposes no obligation on the Lender to admit its mistake, much less make corrections in other affected accounts as the federal statutes require. According to the Court, "far more important than . . . technical compliance is the bottom-line." (A.15a) Thus, as long as a Lender ultimately "waives" the balance in a complaining borrower's

account, it need not acknowledge its error no matter how obvious, [12] permitting it to successfully conceal similar errors in the accounts of thousands of other borrowers.

Petitioner submits that Congress could not have intended the requirement that a Lender provide a borrower with "written notification of [a] correction" to permit the Lender to falsely maintain that it never made a mistake in the first place.

THE COURT'S FINDINGS CONCERNING TILA DIRECTLY CONFLICT WITH APPLICABLE TILA STATUTES, FEDERAL RESERVE BOARD REGULATIONS AND WELL-SETTLED CASELAW

In affirming dismissal of the TILA claim, the Second Circuit found that even if a lender improperly collects "payment[s] inconsistent with the [TILA Disclosure] statement's terms" at the Loan's maturity, Congress did not intend "to extend TILA liability far beyond the loan

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[12] The extent to which the Second Circuit would permit a Lender to refuse to acknowledge an obvious error without violating RESPA is evidenced by this exchange during Oral Argument:

> JUDGE KEITH: Couldn't this just have been a mistake?
> MR. GROBMAN: No, it cannot, Your Honor. . . This is a coverup, Your Honor. It cannot be a mistake for them to continue to insist at this point that we owe money because we paid late. We did not pay late.
> JUDGE MCLAUGHLIN: *But they thought they did.*
> MR. GROBMAN: Those are our allegations – excuse me?
> JUDGE MCLAUGHLIN: *The company thought they did pay late.*
> MR. GROBMAN: . . .They can't think it . . . based on their own documents . . .
> JUDGE MCLAUGHLIN: *They're misreading their own documents.*

(App. 32a (emphasis added))

transaction itself," and thus "any questions concerning the nature of defendants' acts in the year 2000 are moot." (App. 11a, 12a)

Moreover, though never raised or addressed below,[13] the Second Circuit also concluded that the Petitioners' "claim fails on the merits" because "they have not demonstrated that Appellees violated TILA." (App. 2a) No explanation whatsoever was provided for this conclusion, which directly conflicts with specific TILA provisions as well as regulations enacted by the Federal Reserve Board.

A. The Conclusion that Money Store Failed to Violate TILA

The issue of whether the actions alleged by Petitioners would violate TILA was first raised by the Second Circuit at oral argument. As Counsel advised the Court in a March 6, 2002 follow-up letter in response to these questions, §226.21 of Regulation Z speaks directly to TILA's applicability where a borrower is wrongly compelled to pay more than that disclosed or owed at the conclusion of a mortgage:

> **226.21 Treatment of credit balances**
>
> When a credit balance in excess of $1 is created in connection with a transaction (through transmittal of funds to a creditor in excess of the total balance due on an account, ***through rebates of unearned finance***

[13] It is the general rule "that a federal appellate court does not consider an issue not passed upon below" absent special circumstances, such as where "the proper resolution is beyond any doubt" or "where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (internal citations omitted). The Second Circuit ignored this rule when it decided the TILA issue without the slightest indication that any such circumstance existed here – indeed, without any explanation for its holding at all. Thus, the Panel's "resolution of the merits [was] an unacceptable exercise of its appellate jurisdiction." 428 U.S. at 119-20

> ***charges*** or insurance premiums, or ***through amounts otherwise owed to*** or held for the benefit of ***a consumer***), the creditor shall:
>
> (a) ***Credit the amount of the credit balance to the consumer's account; . .***
> .
>
> (c) ***Make a good faith effort to refund to the consumer by cash, check, or money order . . . any part of the credit balance remaining*** *in the account more than 6 months.* . . (12 CFR §226.21 (emphasis added))

As this Court has held, "absent some obvious repugnance to the statute, the Board's regulation implementing [TILA] should be accepted by the courts." *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981). The Second Circuit completely overlooked §226.21 in concluding that the Petitioners had failed to plead a TILA cause of action.[14]

Moreover, as the Petitioners pointed out, the Federal Trade Commission – the Agency charged with enforcing TILA (see 15 U.S.C. § 1607) – has previously found that identical practices by the Money Store in thousands of borrower's accounts violated §1638 of TILA. (R. 39-40) Yet the Court of Appeals did not even refer to, much less distinguish, the FTC's conclusion that past practices identical to those complained of here violated TILA.[15]

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[14] Indeed, TILA §1666d imposes the identical requirement on lenders.

[15] While it is impossible to determine the basis for the Court's TILA holding, the court chastised Petitioners at Oral Argument for being unable to precisely quantify their damages, and compared the borrowers' inability to state a specific damage amount on a Rule 12(b)(6) motion to the lender's failure to accurately determine how much the borrower owes:

B. The Conclusion that the TILA Statute of Limitations Insulates a Lender's Attempts to Collect More than the Amount Disclosed Or Owed At The Maturity of a Loan

As shown above, both TILA and Regulation Z clearly apply to the conduct Petitioners claim occurred here.

> MR. GROBMAN: The TILA disclosure document says this: early payment will . . . result in a reduction of the total payments. [Money Store] did not waive the amount owed. We are, in fact, entitled to additional amounts.
> JUDGE JACOBS: How much?
> MR. GROBMAN: I don't know, hundreds.
> JUDGE JACOBS: *How can you not know? I mean, you just said they have to know exactly how much. . .*
> JUDGE MCLAUGHLIN: *You have the papers. You can't make a mistake.*
> MR. GROBMAN: . . . [T]hat is an accountant's determination. . . . I don't know what the determination is.
> JUDGE MCLAUGHLIN: *If you have to do it, it's an accountant's fault. When they have to do it, it's their fault. This sounds like Enron.* (App. 33a (emphasis added))

With all due respect, the Court's comparison is attenuated, to say the least. As this Court has repeatedly recognized, plaintiffs are not required to quantify their damages in the Complaint: "[A]t the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim." *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) In contrast, TILA imposes specific affirmative obligations on the Lender to accurately disclose the Finance Charge and Total of Payments (§1638), to correct any inaccuracies in those disclosures so that the borrower pays no more than the amount disclosed (§1640(b), and to refund any excess payments made by the borrower. (§1666d) Moreover, "creditors must *comply strictly* with the mandates of TILA," *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995), and errors *are not permitted* unless the Lender demonstrates that it "maint[ained] procedures reasonably adapted to avoid any such error." 15 U.S.C. §1640(c)

Yet, according to the affirmed decision, Petitioners are prevented by the Statute of Limitations from even proving their claim, since Congress did not intend "to extend TILA liability far beyond the loan transaction itself." (App. 12a) Thus, under the court's interpretation, following the first year of the Loan, a lender may fraudulently demand and collect amounts in excess of those disclosed or owed without fear of any affirmative TILA liability, since actions taken by the lender at the maturity of the Loan "are moot." (App. 11a)

Neither the District Court nor the Second Circuit even mentioned, much less addressed, how their conclusion can possibly be reconciled with:

- §1640(b) of TILA, which requires that "within sixty days after discovering an error", a lender "notifies the person concerned" and makes "whatever adjustments . . . are necessary to assure that the person will not be required to pay an amount in excess of the . . . [amount] actually disclosed";[16]

- §226.21 of Reg. Z *and* §1666d of TILA, each of which require the return of unearned finance charges, excess payments or "amounts otherwise owed" to a consumer at the conclusion of a mortgage.

No such reconciliation between these statutes and the court's holding is possible – the conclusion that the TILA Statute of Limitations accrues "at the time loans are made, not upon each payment inconsistent with the [Disclosure]

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[16] Indeed, after counsel quoted from TILA §1640(b) during oral argument before the Court of Appeals, Justice McLaughlin commented that "I wouldn't want to parse that sentence." (App. 31a) No mention of §1640(b) was made in either the District Court or the Second Circuit's decision.

statement's terms" is irrevocably at odds with §226.21 and §1666d's requirement that the excess payments be refunded to the borrower, with §1640(b)'s requirement that the lender correct errors so that the borrower pays no more than the amount originally disclosed, and with other TILA provisions which demonstrate that Congress interest in "protect[ing] the consumer against inaccurate and unfair credit practices" (15 U.S.C. § 1601) was by no means limited to a mortgage's first year.[17]

C. Equitable Tolling

The Court found that equitable tolling applies to TILA actions, but determined that, "in order to make out even a *prima facie* case for equitable tolling, plaintiffs would have to allege that defendants took actions, apart from the disclosure statement and during the one-year statute of limitations period, in an attempt to fraudulently conceal plaintiffs' cause of action." (App. 11a) According to the Court, since the "Complaint does not allege that [Money Store] committed any act of fraud towards plaintiffs ... during the year following the disclosure statement . . . equitable tolling does not apply." (App.11a)

The logical problems with this analysis are never addressed: Petitioners have alleged – and logic dictates – that they could not possibly determine whether the Total of Payments and Finance Charge disclosed by the lender at the *outset* of the mortgage were accurate until the loan's *conclusion*, when Money Store wrongfully demanded *and*

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[17] For instance, §226.20 of Regulation Z requires lenders to make "new disclosures" if "the payment amount or number of payments is increased beyond that remaining on the existing transaction," or if the creditor "adds a variable rate feature to the obligation" (FRB Official Staff Commentary to §226.20), and the Federal Reserve Board's "TILA Compliance Examination Procedures" states that "additional disclosures are not required as a result of subsequent events, *unless certain annual percentage rate inaccuracies . . . are involved.*" Quoted in *Weigel v. Nationsbank*, 1994 WL 543499 (D. Md. 1994).

retained more money than what it was entitled to. Yet, according to the Court, unless a borrower can allege acts in year *one* showing that the lender concealed its intention to retain more than the amount disclosed decades later at the loan's maturity, equitable tolling cannot apply, even if – as alleged here – the TILA violation is inherently self-concealing.[18]

To the best of Petitioner's knowledge, the Court's conclusion that equitable tolling cannot apply absent active concealment by the defendant directly conflicts with every

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[18] In the affirmed decision, the District Court suggested that the Petitioners might have learned of the TILA violation earlier "by simply comparing the loan documents, disclosure statement and any account statements." (App. 47a) When Petitioners subsequently pointed out that neither the "loan documents" nor "account statements" were *even in the record*, and that – even if they had been – the court could not consider them without converting the 12(b)(6) motion into one for summary judgment, the Court issued a "clarified" Opinion, stating that it had not relied on information outside of the Complaint, and that the above "statement was simply a *dicta* argument *based on the fact* that commercial lenders routinely mail to customers statements of equity and outstanding principal on loans from which plaintiffs could have discovered the alleged inconsistencies." (App. 47a (emphasis added)) Whether *dicta* or not, the court's willingness to credit an assertion found only in a ***brief*** submitted by Money Store violates the rule prohibiting consideration of matters outside the pleadings on a 12(b)(6) motion. *Carter v. Stanton*, 92 Sup.Ct. 1232, 1234 (1972). More fundamentally, because "accepting disputed evidence not tested in the crucible of trial is a sharp departure from standard practice," *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995), a judicially-noticed fact "must be one that only an unreasonable person would insist on disputing." *U.S. v. Jones*, 29 F.3d 1549, 1552 (11th Cir. 1994). Here, the purported "fact" that "lenders routinely mail to customers statements of equity and outstanding principal" does not remotely satisfy the requirement of indisputibility, much less the court's *additional* conclusion that "plaintiffs could have discovered the alleged inconsistencies" from the alleged contents of these statements. *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) (reversing dismissal premised in part on judicially noticed fact because "there was no opportunity afforded petitioners to contest the facts assumed in that conclusion ...[nor] evidence before the courts from which such a finding . . . could be properly made")

Supreme Court decision on the issue and decisions from every other Federal Circuit. *See, e.g., Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1947) (equitable tolling read into every federal statute of limitation applies even if "there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party"); *Blacks Law Dictionary* (7th Ed. 1999), p. 560 ("Equitable tolling does not require misconduct by the defendant"); *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) ("equitable tolling does not require any misconduct on the part of the defendant"); *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996) ("equitable tolling does not require any misconduct on the part of the defendant").[19]

Appellate Courts have treated equitable tolling under TILA no differently. Each Federal Circuit holding that equitable tolling applies to TILA actions has followed *Holmberg* or *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874), both of which conclude that affirmative concealment by the defendant is *not required*. *See, e.g., Ellis v. G.M. Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3rd Cir. 1998).

Moreover, at least three Federal Circuits and one state Supreme Court have recognized that equitable tolling of a TILA claim is appropriate where the Lender has *either* actively concealed the TILA violation *or* committed a violation "*in a manner that it concealed itself* until such time as [the defendant] could plead the statute of

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[19] *See also Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000) ("unlike equitable estoppel, equitable tolling does not depend on any wrongful conduct by the defendant to prevent the plaintiff from suing"); *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1095 (6th Cir. 1996) ("the District Court did not need to find that [defendant] had engaged in wrongful conduct for equitable tolling to apply"); *Hamilton v. Komatsu Dresser Industries*, 964 F.2d 600, 605 (7th Cir. 1992) ("the equitable tolling doctrine does not require the plaintiff to show any misconduct on the part of the defendant")

limitations." *Ramadan*, 156 F.3d at 502 (emphasis added); *Jones v. Transohio Sav. Ass'n*, 747 F.2d 1037, 1041 (6th Cir. 1984) (same).[20] As these courts have found, the critical inquiry for tolling purposes is not whether the borrower has alleged active concealment by the Lender, but rather at what point "the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." *King v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986); *Hamilton v. Ohio Savings Bank*, 637 N.E.2d 887, 889 (Ohio Sup. Ct. 1994)[21]

Rather than undertaking this analysis, the Second Circuit applies a rigid rule that bars suit more than one year after consummation of the mortgage unless the borrower is able to allege specific affirmative acts of fraudulent concealment by the Lender in year one. Even if TILA were not a "remedial statute" which must "be given a broad, liberal construction in favor of the consumer." *Begala v. PNC Bank*, 163 F.3d 948, 950 (6th Cir. 1998), Petitioner respectfully submits that the court's truncated tolling analysis and its disregard of clearly applicable TILA statutory provisions mandate review by this Court.

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[20] Indeed, courts have routinely allowed TILA actions to go forward where plaintiffs have claimed that the TILA violation was inherently self-concealing. *See, e.g., In re Consolidated Insurance Fee Litigation*, 195 F.R.D. 684, 693-94 (M.D. Ala. 2000); *Weil v. Long Island Savings Bank*, 77 F. Supp. 313, 326 (E.D.N.Y. 1999); *Bermudez v. First of America Bank Champion, N.A.*, 860 F. Supp. 580, 598 (N.D. Ill. 1994); *Hamilton v. Ohio Savings Bank*, 637 N.E.2d 887 (Ohio Sup. Ct. 1994).

[21] The cases from other district courts cited in the Opinion below are not to the contrary. Each was decided on summary judgment, not on a motion to dismiss. Each involved a finding that equitable tolling could not apply because the borrowers had a "reasonable opportunity" to discover the inaccurate disclosures at the time the Loan was consummated. See, e.g., *Hubbard v. Fidelity Federal Bank*, 824 F. Supp. 909, 920 (C.D. Cal. 1993). Finally, and most importantly, none of these cases involved Lenders who attempted to and in fact collected amounts in excess of the amount disclosed and owed at the conclusion of the mortgage.

THE LOWER COURTS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Finally, while the construction of RESPA and TILA below significantly erodes the statutory protections afforded by Congress, the concern here goes beyond the potential for increased lender abuse. This Court has stressed that society has a right to presume "that the law will not merely change erratically, but will develop in a principled and intelligible fashion," and "that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)

Here, the circumstances raise serious questions about whether the interpretation of RESPA and TILA proceeded in an "intelligible fashion" consistent with the "accepted and usual course of judicial proceedings." (Sup. Ct. Rule 10) The court below persistently failed to address relevant authority which seemingly conflicted with its decision, and repeatedly ignored fundamental rules governing a motion to dismiss:

(1) by addressing and deciding the merits of the TILA claim despite the issue never having been raised and without citing to a single authority, in violation of *Singleton v. Wulff*, 96 S.Ct. 2868 (1976) *(Infra at p. 21, fn 13)*

(2) by relying upon matters outside the pleadings without converting the motion to one for summary judgment, in violation of *Carter v. Stanton*, 92 S.Ct. 1232, 1234 (1972); *(Infra at p. 26, fn 18)*

(3) by taking judicial notice of "facts" which were wholly outside the record and clearly subject to reasonable dispute, in violation of *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974); *(Infra at p. 26, fn 18)*

(4) by ignoring the rule that a court reviewing a Rule 12(b)(6) dismissal "must assume the truth of the material facts as alleged in the complaint." *Davis v. Monroe County Bd. Of Education*, 119 S.Ct. 1661, 1666 (1999) *(Infra at pp. 9-10)*

Given this repeated departure from procedural norms at the earliest stage in the judicial process, it is difficult not to conclude that the court's abbreviated analysis of the TILA and RESPA claims may have resulted from a feeling that Petitioners' federal causes of action were not deserving of significant judicial time and resources.

CONCLUSION

Wherefore, for each of the above reasons, Petitioners respectfully request that their Petition for Certiorari be granted in all respects.

Respectfully submitted,

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Counsel for Petitioners and the Class

(Any footnotes trail end of each document)

01-7774

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAM AND MARIA CARDIELLO,
Plaintiffs-Appellants,

-v.-

THE MONEY STORE, ET AL,
Defendants-Appellees.

March 15, 2002, Decided

COUNSEL:
APPEARING FOR APPELLANTS: PAUL GROBMAN, New York, N.Y. (NEAL A. DEYOUNG on the brief).

APPEARING FOR APPELLEE: MARTIN I. KAMINSKY, Pollack & Kaminsky, New York, N.Y. (W. HANS KOBELT on the brief).

JUDGES:
PRESENT: HON. JOSEPH M. McLAUGHLIN, HON. DENNIS JACOBS, HON. DAMON J. KEITH *, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be **AFFIRMED** substantially for the reasons stated in Judge Buchwald's Memorandum and Order dated May 31, 2001. Appellants' Truth in Lending Act ("TILA") claim is barred by the one-year statute of limitations. See *15 U.S.C. 1640*(e). Moreover, Appellants' claim fails on

the merits; they have not demonstrated that Appellees violated TILA.

We affirm the District Court's dismissal of Plaintiffs-Appellants' claim under the Real Estate Settlement Procedures Act and their claim to enforce the Federal Trade Commission agreement for the reasons stated in Judge Buchwald's Memorandum and Order.

Footnote

* Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

00 Civ. 7332 (NRB)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

SAM CARDIELLO and MARIA CARDIELLO, on behalf of themselves and all others similarly situated,
Plaintiff,

against

THE MONEY STORE, INC., TMS MORTGAGE, INC., and THE MONEY STORE/EMPIRE STATE INC.,
Defendants.

May 31, 2001, Decided

June 1, 2001, Filed

COUNSEL:
For SAM CARDIELLO, MARIA CARDIELLO, plaintiffs: Neal A. DeYoung, Paul Stewart Grobman, New York, NY.

For defendants: Martin I Kaminsky, W. Hans Kobelt, POLLACK & KAMINSKY, NEW YORK, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY:
NAOMI REICE BUCHWALD

OPINION:
OPINION AND ORDER
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs Sam and Maria Cardiello (collectively "the Cardiellos" or "plaintiffs") bring this action for compensatory and statutory damages against defendants The Money Store,

Inc., TMS Mortgage, Inc. and The Money Store/Empire State, Inc. (collectively "Money Store" or "defendants") under the Federal Truth in Lending Act ("TILA"), *15 U.S.C. § 1601* et seq., the Real Estate Settlement Procedures Act ("RESPA"), *12 U.S.C. § 2601* et seq., and various state causes of action. Furthermore, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), plaintiffs seek to represent certain classes of persons who purchased and/or maintained residential home equity loans with defendants during the period from October 1, 1994 to the present. Defendants now move to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and *28 U.S.C. § 1367*(c). For the reasons stated below, defendants' motion is granted and plaintiffs' complaint is dismissed.

BACKGROUND

In May 1985, plaintiffs obtained a home mortgage ("the Loan") from defendants. n1 At the time, defendants provided plaintiffs a Truth in Lending Disclosure Statement ("the disclosure statement" or "the statement") The disclosure statement stated an amount financed of $ 30,264, a finance charge of $ 46,423, an annual percentage rate of 15.12% and a payment total of $ 76,687. According to the statement, plaintiffs would pay-off the loan through 180 monthly payments of $ 426.04, due on the fifteenth of every month, with the last payment being due on or about May 15, 2000. The statement also provided that:

"The amounts shown as the finance charge and total payments are based on the assumption that you will pay the monthly installments when due. Late payment of the monthly installments will increase the finance charge and total of payments, early payment will decrease them." Reply Aff. of Mark Buechner, Ex. H.

Over the course of the next fifteen years, plaintiffs made payments of $ 426.04 each month. In January 2000, plaintiffs received a notice from the Money Store that stated that as of May 2000, the original time of the Loan's maturity, plaintiffs would still owe $ 2,157.16 in principal. Plaintiffs thereafter contacted the Money Store and questioned the apparent discrepancy between the Loan's maturity date as set-out in

the disclosure statement and the notice of the remaining principal due. By letter dated January 19, 2000, the Money Store responded to plaintiffs' inquiry by explaining that the principal balance was still due and owing, notwithstanding the original maturity date on the disclosure statement. The Money Store sent two additional letters, on or about April 3, 2000 and May 26, 2000, advising plaintiffs of the outstanding balance due on the Loan and demanding that the balance be paid promptly.

Plaintiffs retained counsel who wrote a letter to the Money Store on or about June 8, 2000, requesting an explanation of the monies defendants claimed plaintiffs owed. On or about June 13, 2000, the Money Store provided a Payoff Statement to plaintiffs' counsel that demanded payment of $ 2,157.16 in unpaid principal and $ 56.56 in interest accumulated on the outstanding balance. By a "standardized debt collection letter" dated June 21, 2000, the Money Store notified plaintiffs that unless they remitted the $ 2,249.07 they allegedly owed, within thirty days, the Money Store would "invoke any and all remedies provided for in the Note and Security Instrument, including but not limited to the foreclosure sale of the property." Complaint at § 33.

On June 28, 2000, P.T. Winterbottom ("Mr. Winterbottom"), a Customer Relations Specialist at the Money Store, wrote a direct response to plaintiffs' counsel's letter of June 8, 2000. n2 In his letter, Mr. Winterbottom explained that the actual principal owed could vary from the amount originally forecast on the disclosure statement if borrowers made late payments. n3 Furthermore, Mr. Winterbottom noted, due to the Money Store's agreement with the Federal Trade Commission ("FTC") in 1991, n4 the interest calculation methodology on plaintiffs' loan was changed, effective August 1990. Mr. Winterbottom declared that the change resulted in a benefit to borrowers and that a check in the amount of $ 235.86 was forwarded to plaintiffs on or about February 14, 1992 to compensate them for the change in methodology. Mr. Winterbottom concluded by stating that:

"although we are under no obligation to do so, in the interest of fostering amicable customer relations, the Money Store has reapplied all of the Cardiello's payments from the inception of the loan using the latter interest calculation method. As a result of this reapplication the current outstanding balance of the subject loan is now $ 163.21, due June 15, 2000."

The letter explained that a spreadsheet describing the reamortization was attached and invited plaintiffs to contact Mr. Winterbottom directly, at his personal extension.

On July 17, 2000, Mr. Winterbottom mailed plaintiffs a "follow-up" letter. See Reply Aff. of Mark Buechner, Ex. G. Mr. Winterbottom first addressed plaintiffs' concern about being unable to locate a description of the "simple interest" method by directing them to the description of the method found on their TILA disclosure statement and apparently enclosing a copy of the statement with the pertinent passage highlighted. Next, Mr. Winterbottom responded to plaintiffs' assertion that they did not receive a check from the Money Store in connection with the FTC agreement. He informed plaintiffs that he regretted that the Money Store did not have a copy of the check itself, but referred the plaintiffs to the spreadsheet enclosed in his letter of June 28 as evidence that the change in interest calculation was to plaintiffs' advantage. Finally, "in the interest of amicable customer relations," the Money Store agreed to waive the remaining balance on plaintiffs' account and release the lien on its secured property. Mr. Winterbottom stated that he was returning plaintiffs' July 6, 2000 personal check for $ 191.71 n5 with the letter and again invited plaintiffs to contact him directly on his personal extension.

Plaintiffs filed this action on September 27, 2000 and defendants moved to dismiss on January 19, 2001.

STANDARD OF REVIEW

Defendants move to dismiss plaintiffs' claims, pursuant to Fed. R. Civ. P. 12(b)(6) and *28 U.S.C. § 1367*(c). In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true all material factual allegations in

the Amended Complaint, *Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992)*, and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996)*; see *Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. "General, conclusory allegations need not be credited, however, when they are belied by more specific allegations of the complaint." *Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2d Cir. 1995)* (citing *Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216, 227 (S.D.N.Y. 1978)*; 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1363, at 464-65 (2d ed. 1990). In addition to the facts set forth in the Amended Complaint, we may also consider documents attached thereto and incorporated by reference therein, *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d. Cir. 1998)*, matters of public record such as case law and statutes, *Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d. Cir. 1998)*, and matters of judicial notice. See *Brass v. American Film Technologies, Inc., 987 F.2d 142, 150.* (2d Cir. 1993); *Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991)*.

DISCUSSION

I. Federal Truth in Lending Act

TILA's primary purpose is to help the unsophisticated consumer understand the real costs of financing. Thus, the Act seeks "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." *15 U.S.C. § 1601.* "To accomplish its purpose, the TILA and its implementing Regulation Z require lenders to disclose to consumers certain material terms clearly and conspicuously in writing, in a form that the consumer may examine and retain for reference." *In re Ralls, 230 B.R. 508, 515 (E.D. Pa 1999). 15 U.S.C. § 1640* creates a private right of action for violations of TILA.

Plaintiffs allege that defendants violated § 1638 of TILA and Regulation Z, *12 C.F.R. § 226.18*, in two respects. n6 First, plaintiffs allege that the disclosure statement defendants provided them in 1985 misrepresented the amount of principle and finance charges plaintiffs were required to pay. Furthermore, plaintiffs contend that defendants took affirmative steps in the first half of 2000 to conceal these misrepresentations and coerce plaintiffs to pay the disputed sums. Second, plaintiffs allege that defendants failed to compensate plaintiffs, pursuant to the FTC Agreement, for TILA violations arising from defendants' method of calculating interest. n7 For the purposes of deciding this motion, we will assume that the disclosure statement defendants provided to plaintiffs violated § 1638 of TILA and Regulation Z, 12 C.F.R. § 226. 18.

Congress provided a one year statute of limitations for private actions based on violations of TILA. See *15 U.S.C. § 1640*(e) ("Any action under this section may be brought... within one year from the date of the occurrence of the violation."). It is well-settled law that in "closed-end credit" n8 transactions, like the one at issue, the "date of the occurrence of violation" is no later than the date the plaintiff enters the loan agreement or, possibly, when defendant performs by transmitting the funds to plaintiffs. See *Salois v. Dime Sav. Bank, 128 F.3d 20, 25 (1st Cir. 1997); King v. State of California, 784 F.2d 910, 914 (9th Cir. 1986); K/O Ranch, Inc. v. Norwest Bank, 748 F.2d 1246, 1248-49 (8th Cir. 1984); In re Smith Smith v. American Fin. Sys., Inc., 737 F.2d 1549, 1552 (11th Cir. 1984); Bartholomew v. Northampton Nat. Bank, 584 F.2d 1288, 1296 (3d Cir. 1978); Stevens v Rock Springs Nat. Bank, 497 F.2d 307, 309-10 (10th Cir. 1974); Wachtel v West, 476 F.2d 1062, 1066 (6th Cir. 1973); Van Pier v. Long Island Sav. Bank, 20 F. Supp. 2d 535, 538-39 (S.D.N.Y. 1998)*. Thus, at the latest, plaintiffs' TILA claims accrued when the mortgage was closed in 1985 and when the Money Store allegedly failed to comply with the FTC Settlement in 1991. In either case, the one year statute of limitations ran years ago unless plaintiffs can demonstrate that it should be tolled.

Although the Second Circuit has yet to determine whether the doctrine of equitable tolling applies delay the commencement of the running of the statute of limitations under TILA § 1640, the weight of authority overwhelmingly suggests that it does. See *Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998)* (equitable tolling can apply to TILA § 1640 actions); *Ramadan v. Chase Manhattan Corp., 156 F.3d 499 (3d Cir. 1998)* (same); *Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1166-67 (7th Cir. 1997)* (same); *King v. State of California, 784 F.2d 910, 914-15 (9th Cir. 1986)* (same); *Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1039-43 (6th Cir. 1984)* (same); *Eubanks v. Liberty Mortgage Banking Ltd., 976 F. Supp. 171, 174 (E.D.N.Y. 1997)* (same); *Campbell v. Chandler Assoc., Inc., 1997 U.S. Dist. LEXIS 3998*, No. 95- *CV-1770, 1997 WL 151889* at *2 (N.D.N.Y. March 28, 1997) (same); but see *Hardin v. City Title & Escrow Co., 254 U.S. App. D.C. 370, 797 F.2d 1037, 1039-41 (D.C. Cir. 1986)* (dicta suggesting that equitable tolling would not apply to a TILA § 1640 claim). We find ourselves in agreement with the essential analysis underlying the weight of precedent and, accordingly, consider whether the federal doctrine of fraudulent concealment tolls plaintiffs' TILA § 1640 claims.

The federal doctrine of fraudulent concealment tolls the statute of limitations "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part.'" *Holmberg v. Armbrecht, 327 U.S. 392, 397, 90 L. Ed. 743, 66 S. Ct. 582 (1946)* (quoting *Bailey v. Glover, 88 U.S. 342, 348, 22 L. Ed. 636 (1874))*; see *Fitzgerald v. Seamans, 180 U.S. App. D.C. 75, 553 F.2d 220, 228 (D.C. Cir. 1977)* ("read into every federal statute of limitations . . . is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit."); *Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236, 239 (2d Cir. 1962)* (en banc). Specifically,

"The Second Circuit finds equitable tolling on the basis of fraudulent concealment if the plaintiff shows "(1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within [the applicable statutory period] of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *Campbell, 1997 U.S. Dist. LEXIS 3998* at *5 (citing *State of New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988))*.

The *sine qua non* of fraudulent concealment is that the defendant fraudulently concealed from the plaintiff his cause of action *during the time in which plaintiff could have brought that action*. Absent such allegations, equitable tolling does not apply. See *In re Woolaghan, 140 B.R. 377, 382 (W.D. Pa. 1992); Hubbard v. Fidelity Federal Bank, 824 F. Supp. 909 (C.D. Cal. 1992)*, aff'd in part and rev'd in part, *91 F.3d 75 (9th Cir. 1994)*.

In cases involving TILA, "the courts have held uniformly that fraudulent conduct beyond the nondisclosure itself is necessary to equitably toll the running of the statute of limitations." *Pettola v. Nissan Motor Accept. Corp., 44 F. Supp. 2d 442, 450 (D. Conn. 1999)* (citing *Evans v. Rudy-Luther Toyota, Inc., 39 F. Supp. 2d 1177 (D. Minn. 1999); Jones v. Saxon Mortg., 980 F. Supp. 842, 846 (E.D. Va. 1997); Kicken v. Valentine Prod. Credit Ass'n, 628 F. Supp. 1008, 1011 (D. Neb. 1984)*, aff'd, *754 F.2d 378 (8th Cir. 1984)* (table decision); *Hughes v. Cardinal Fed. Sav. & Loan Ass'n, 566 F. Supp. 834, 838 (S.D. Ohio 1983))*. The holdings make good sense because if the very nondisclosure or misrepresentation that gave rise to the TILA violation also tolled the statute of limitations, the effect of the statute of limitations would be nullified. See *Hughes, 566 F. Supp. at 838* ("otherwise the one-year statute of limitations would be tolled in almost every TILA action in which a non-disclosure violation was found and the statutory limitations provision would be a nullity"). Thus, we turn to the Complaint and look for the fraudulent conduct defendants are alleged to have undertaken, aside from the purported misrepresentation on

the disclosure statement, during the one-year statute of limitations period following the loan.

The Complaint makes the generalized allegation that "the foregoing acts and omissions of Defendants were undertaken by them willfully, maliciously, intentionally, knowingly, and/or in gross or reckless disregard of the rights of Plaintiffs." Complaint at P42. However, a cursory examination reveals that all of the "acts and omissions" attributed to defendants occurred in 2000. complaint at P23-40 (acts and omissions described allegedly occurred between January 2000 - July 7, 2000). In order to make even a prima facie case for equitable tolling, plaintiffs would have to allege that defendants took actions, apart from the disclosure statement and during the one-year statute of limitations period, in an attempt to fraudulently conceal plaintiffs' cause of action. However, the Complaint does not allege that defendants committed any act of fraud towards plaintiffs or, indeed, *any act whatsoever* during the year following the disclosure statement. Thus, equitable tolling does not apply and any questions concerning the nature of defendants' acts in the year 2000 are moot.

Turning plaintiffs' second cause of action under TILA § 1640, we find no merit in the contention that defendants violated TILA by allegedly failing to mail a check to plaintiffs pursuant to the FTC Agreement. Leaving aside the question of whether plaintiffs have any evidence to support this allegation, n9 TILA provides no relief for the Money Store's failure to pay. Failure to comply with an FTC agreement simply is not a TILA violation of TILA § 1638. Accordingly, plaintiffs have failed to state a claim under TILA § 1640.

Finally, in an effort to avoid application of the one-year statute of limitations, plaintiffs raise the alternative grounds "separate accrual" and "triviality." Although plaintiffs dress their argument in the garb of the "separate accrual" doctrine, it fails for the same reason that courts have rejected a "continuing violation" theory for TILA claims – namely, it is well-settled that TILA claims for inaccurate disclosure statements accrue at the time loans are made, not upon each payment inconsistent with the statement's terms. See *Van*

Pier v. Long Island Sav. Bank, 20 F. Supp. 2d 535, 538-39 (S.D.N.Y. 1998) (citing numerous authorities). The doctrine of "triviality" fares no better. It provides that a plaintiff's claims generally do not accrue until his injury is sufficiently severe that he is put on notice that he may be injured. The paradigm example is someone punched in the face who does not discover until some years later that the injury has actually caused a degenerative condition whose signs have only recently become outwardly manifest. In contrast to this hidden condition, evidence of discrepancies between the disclosure statement and the underlying terms of the loan is immediately available by simply comparing the loan documents, disclosure statement and any account statements. Accordingly, courts have consistently held that TILA claims accrue at the time of the loan is made, not when events thrust evidence of the violation in front of plaintiffs' eyes. Id.

Taken together, plaintiffs arguments reflect a basic misunderstanding about the breadth of TILA's application. Although remedial in their purpose, TILA's disclosure requirements are precise in their focus. In the case of "closed-end credit" arrangements, as at bar, they deal almost exclusively with the time leading up to and including the loan transaction itself. The one-year statute of limitations, paucity of provisions dealing with events after the requisite disclosures, and explicit language of *15 U.S.C. § 1634* n10 only provide further evidence of Congress' intent not to extend TILA liability far beyond the loan transaction itself. Plaintiffs' TILA claims fail because they attempt to relate-back conduct temporally and causally remote from the disclosure statement. Thus, for the reasons stated above, plaintiffs' claims under TILA § 1640 for violations of TILA § 1638 and Regulation Z, *12 C.F.R. § 226.18* are dismissed.

II. Real Estate Settlement Procedures Act

Congress enacted RESPA after finding "that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from

unnecessarily high settlement charges caused by certain abusive practices...." *15 U.S.C. § 2601* (a). To wit, Congress intended RESPA to improve disclosure of settlement costs, reduce kickbacks and costly referral fees, reduce required escrow payments for real estate taxes and insurance and improve recordkeeping of land title information. *15 U.S.C. § 2601*(b).

RESPA § 2605(e), the provision at issue, provides that when a covered mortgagor receives a "qualified written request" from a borrower "for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period." RESPA § 2605 (e)(1)(a). Furthermore, no later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt of the request, the servicer must:

"(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes–
(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes–

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower." RESPA § 2605 (e)(1)

If a defendant fails to respond to a qualified inquiry in the manner prescribed by RESPA § 2605, he may be liable for plaintiffs' actual damages, costs and, "in the case of a pattern or practice of noncompliance with the requirements of this section," additional damages not to exceed $ 1000. RESPA § 2605(f)(1)(A) and (B), (f)(3).

Plaintiffs allege that defendants' inadequate response to plaintiffs, "qualified written request" of June 8, 2000 violated RESPA § 2605. Specifically, plaintiffs allege that defendants "knowingly and/or recklessly misrepresented the correct amount owed by Plaintiffs, [and] by failing to acknowledge that there had been a violation of the disclosure requirements...." Complaint at P53. For the purposes of this motion, we will assume that the Loan was covered by RESPA § 2605 and that plaintiffs, letter of June 8, 2000 constituted a "qualified written request." Nonetheless, plaintiffs' claim is without merit.

Defendants' letter of June 28, 2000 fulfilled defendants' RESPA § 2605(e)(1)(a) obligation to acknowledge receipt within 20 days. See Complaint at P36; Aff. of Mark Buechner in Motion to Dismiss, Ex. F (June 28, 2000 letter from P.T. Winterbottom to plaintiffs' counsel Paul Grobman) ("I am writing in response to your undated correspondence, which was received in our Collections Department on June 9, 2000...").

Defendants' letter of July 17, 2000 n11 clearly fulfilled defendants' obligations under RESPA § 2605(e)(2). The letter clearly provided the "reasons for which the servicer believes the account of the borrower is correct as determined by the servicer," the "information requested by the borrower [the

description of "simple interest"] or an explanation of why the information requested is unavailable or cannot be obtained by the servicer [explaining that cashed FTC check was destroyed]," and "the name and telephone number of an individual [P.T. Winterbottom] employed by, or the office or department of, the servicer who can provide assistance to the borrower."

Furthermore, far more important than this technical compliance is the bottom-line: *defendant waived the balance of plaintiffs' loan.* The very purpose of RESPA § 2605 is to guarantee that lenders respond to borrowers concerns. Since it is difficult to imagine a greater accommodation than forgiving the entire amount of a loan in dispute, it strikes this Court that defendants went far beyond what was required of them under RESPA § 2605. Certainly, they did not violate it. Moreover, even assuming plaintiffs could allege that defendants had failed to comply with RESPA § 2605 in some technical respect, plaintiffs appear to have suffered no damages – the entire balance of the loan was waived.

To the extent plaintiffs' claim that defendants violated RESPA § 2605(e)(2) by "taking action with respect to the inquiry of the borrower" prior to providing plaintiffs with the information they requested (a claim proposed in their opposition brief but not appearing in the Complaint), they misconstrue the statute. Specifically, plaintiffs contend that defendants' demands for payment in their letters of June 13 and 21, 2000 constituted "taking action" which plaintiffs argue RESPA § 2605(e)(2) forbids. RESPA § 2605(e)(2) states, in relevant part: "Not later than 60 days... after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall [investigate and respond to plaintiff's inquiry]." Putting aside the impact of the qualification "if applicable," it does not appear that sending letters reminding customers of balances due and the consequences of failing to pay constitutes "action with respect to the inquiry of the borrower."

A review of the legislative history and relevant caselaw provides no explicit guidance as to the meaning of "action

with respect to the inquiry of the borrower." In this absence, we look to the statute's plain meaning and purpose. RESPA's basic purpose is to protect borrowers from exploitation by lenders. Disclosure and timely response requirements, such as RESPA § 2605, serve to inform borrowers. However, disclosure or response is of little value if lenders have instituted some significant action involving third parties while their investigation is ongoing. It appears from the statute's language and structure that provisions such as RESPA § 2605(e)(3), which prohibits a lender from reporting to a "consumer reporting agency" any overdue payment disputed by a borrower in a qualified inquiry, guard against this risk. We read RESPA § 2605(e)(2)'s "action with respect to the inquiry of the borrower" in the same manner - i.e., a lender cannot take an adverse action against the borrower, related to a qualified inquiry, before responding to the inquiry. Reading it to mean that lenders cannot correspond with borrowers about an inquiry at all until they have investigated it fully would create a needless technical obstacle unrelated to the statute's objectives. In the absence of any indication Congress intended this expansive reading, we will not find it.

Although we need not decide here what precisely would constitute "action[s] with respect to the inquiry of the borrower," they might well include commencing foreclosure proceedings against the borrower or suing the borrower. However, sending standard balance due demand letters alone does not constitute an "action with respect to the inquiry of the borrower." Indeed, we take judicial notice of the fact that a great deal of correspondence from consumer lenders is standardized, computer generated notices that are routinely issued with little or no individual review. Although automation would not excuse otherwise illegal actions, elevating routine notices to statutory violation in the absence of any harm is wholly unwarranted. Thus, we find that defendants' letters of June 13 and 21, 2000 did not constitute "action[s] with respect to the inquiry of the borrower" and, accordingly, did not violate RESPA § 2605(e)(2). Accordingly, plaintiffs' RESPA claim is dismissed.

III. State Claims

We have dismissed plaintiffs' federal claims which were the sole predicate for federal jurisdiction. When federal claims are dismissed, retention of state law claims under supplemental jurisdiction is left to the discretion of the trial court. See *28 U.S.C. § 1367*(c)(3) (1994) ("district courts may decline to exercise supplemental jurisdiction over a claim [if]... (3) the district court has dismissed all claims over which it has original jurisdiction."); *Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994); In re Merrill Lynch Ltd. Partnerships Litig., 7 F. Supp. 2d 256, 258 (S.D.N.Y. 1997).* We decline to exercise supplemental jurisdiction over plaintiffs' New York state law claims. Accordingly, we dismiss them.

CONCLUSION

For the reasons discussed above, plaintiffs' federal claims are dismissed for failure to state a claim on which relief can be granted and we decline to exercise supplemental jurisdiction over the remaining state law claims.

IT IS SO ORDERED.

DATED: New York, New York

May 31,2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Unless otherwise indicated, all facts are drawn from the Complaint and documents referenced in the Complaint that are admissible on a motion to dismiss.

n2 Mr. Winterbottom's response specifically refers to plaintiffs' counsel's letter as the letter "received... on June 9, 2000." Reply Aff. of Mark Buechner, Ex. F.

n3 Although plaintiffs did not include a copy of this letter in the Complaint, they explicitly referred to it. Complaint at P36-7 (note that Complaint erroneously numbers two paragraphs as paragraph 36). The Second Circuit has ruled that a court may consider documents relied upon by the plaintiff, but which are not attached to the Complaint. See *I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991);* 5 Wright & Miller, Federal Practice & Procedure § 1327 at 489 and n.15 (when "plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading."). This also holds true for defendants, letter of July 17, 2000, *infra*. Complaint at P40 (see *infra*, note. 9).

n4 According to the Complaint, defendants entered an Agreement Containing a Consent Order ("the FTC Agreement") in June 1991 "settling charges that Defendants were violating TILA in connection with residential mortgage loan transactions." Complaint at P37. Under the Agreement, defendants were required, inter alia, "to make adjustments and/or refunds for each of their customers who were impacted by the alleged violations contained in the Consent Order...." Id. at 38.

n5 Plaintiffs appear to have written defendants a letter on July 6, 2000 in which they submitted a check for the balance due. Since that letter is not explicitly referred to in the Complaint, however, we do not consider it on this motion to dismiss.

n6 Plaintiffs have chosen not to pursue their third and fourth claims for relief under *15 U.S.C. § 1666.* See Plaintiffs' Opposition Brief at note 1. Accordingly, these claims are dismissed.

n7 This allegation was not articulated in the Complaint. However, since plaintiffs raise it in their opposition papers and would be permitted to amend the Complaint to add it, we consider it on this motion.

n8 The distinction between "open-end" credit (i.e., an open line of credit like a credit card or revolving credit

facility) and a "closed-end credit" (i.e., a consummated loan like a mortgage or auto loan), is discussed in *Baskin v. G. Fox & Co., 550 F. Supp. 64, 66-67 (D. Conn. 1982).*

n9 We do not look beyond the four corners of the Complaint and the narrow range of related documents in deciding this motion. However, we do note that defendants have proffered substantial evidence to suggest that plaintiffs received and cashed a check from the Money Store as compensation from the FTC Agreement. Specifically, defendants have produced a contemporary computer print-out of a compliance report submitted to the FTC as part of the Agreement in which they reported that plaintiffs had cashed a check for $ 235.86 that had cleared on March 31, 1992. See Aff. of Mark Buechner in motion to Dismiss, Ex. C, D. Furthermore, defendants aver that they have located a box containing the checks that the Money store sent to customers as part of its compliance with the FTC Agreement, but which were *not* cashed by customers. Defendants swear that they have reviewed the checks in the box and that the check to plaintiffs was not among them. See Reply Aff. of Mark Buechner at P4. Despite plaintiffs' protestations to the contrary, this evidence would likely be admissible as business records.

n10 *15 U.S.C. § 1634* reads: "If information disclosed in accordance with this part is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this part."

n11 The Complaint describes this letter as having been sent on July 7, 2000. Complaint at P40. However, a copy of the letter was enclosed in Aff. of Mark Buechner in Motion to Dismiss, Ex. G, and is dated July 17, 2000. The difference is immaterial, however, as both dates fall well within the 60 day response time provided under RESPA § 2605(e)(2).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

SDNY
00-cv-7332
Buchwald

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of June two thousand two.

Dkt No:
01- 7774

Sam Cardiello and Maria Cardiello, on behalf of themselves and all others similarly situated,

Petitioners-Appellants,

v.

The Money Store, TMS Mortgage, Inc. and The Money Store/Empire State Inc.,

Defendant s-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant's Maria Cardiello and Sam Cardiello

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:
Arthur M. Heller,
Administrative Attorney

Docket No: 01- 7774

SAM and MARIA CARDIELLO,

Petitioners-Appellants,

v.

THE MONEY STORE, et al.,

Defendants-Appellees.

March 1, 2002

TRANSCRIPT OF CIVIL CAUSE FOR MOTION

BEFORE: JOSEPH M. McLAUGHLIN, Circuit Judge
DENNIS JACOBS, Circuit Judge
DAMON J. KEITH. Circuit Judge

APPEARANCES:
For the Appellant: PAUL S. GROBMAN, ESQ.
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JUDGE JACOBS: The next case we'll hear, the last one on the calendar, is Cardiello versus The Money Store. [Pause] Good morning.

MR. GROBMAN: Good morning. May it please the Court, my name is Paul Grobman, counsel for Sam and Maria Cardiello in this action. At issue on this appeal is whether Congress intended the prohibition against unscrupulous lending practices contained in TILA to apply in only the first year of a multi-year mortgage, leaving lenders essentially free thereafter to attempt to fraudulently collect amounts in excess of those disclosed or even owed under a loan.

Plaintiffs Sam and Maria Cardiello took out a mortgage loan with The Money Store in 1965. Pursuant to the requirements under the Truth in Lending Act, The Money Store provided the Cardiellos at that time with a TILA disclosure statement which indicated, among other things, the amount financed, the total finance charge and total of payments that they would pay at the conclusion of the loan.

JUDGE JACOBS: Was that disclosure a document consistent with what the underlying loan documents said, or did they deviate?

MR. GROBMAN: As far as we can tell, they did not deviate with any document in our possession. What happened

JUDGE JACOBS: I'm not sure I understand. Surely you have the loan documents in your possession.

MR. GROBMAN: We do. We do.

JUDGE JACOBS: Okay, so the loan documents that contain the obligation you are not contending that the loan documents contain any terms different than what was disclosed in the TILA disclosure statement.

MR. GROBMAN: What we are contending is –

JUDGE JACOBS: No, but could you just say kind of yes or no before we get to what you're contending? Are you contending that the TILA disclosure statement misrepresented what was in what was written in the underlying loan documents that —

MR. GROBMAN: No.

JUDGE JACOBS: — your client was okay.

MR. GROBMAN: No.

JUDGE JACOBS: Okay. Okay. Now you're off to what you are contending.

MR. GROBMAN: Sure. I'm sorry, Your Honor. As I said, the TILA disclosure document provided the amount financed, the total of payments that the Cardiellos would be required to pay at the conclusion of the loan, the total finance charge, the date and amount that each payment was due, and a statement that early payments under the loan would lead to a reduced total of payments than those disclosed in the TILA disclosure statement, and late payments would result in increased total payments. The —

JUDGE McLAUGHLIN: You have no problem with any of that.

MR. GROBMAN: Absolutely not. Absolutely not. In fact, the Cardiellos scrupulously adhered to the terms and conditions of that TILA disclosure statement. They made all off their payments on time. In fact, as we will show if given the opportunity, the Cardiellos paid hundreds of days early over the course of the loan.

Nevertheless, in January 2000 the Cardiellos received a communication from The Money Store stating that upon the loan's maturity in May of 2000 the Cardiellos were going to owe some twenty one hundred dollars over and above the amount which was disclosed in the TILA disclosure statement. As the rationale f or why this amount was owed,

The Money Store stated that the Cardiellos had paid late under the terms of the loan.

The Cardiellos knew that this was absolutely not the case, and they spent the better part of the next five months attempting to convince The Money Store that they had scrupulously followed the terms of the TILA disclosure statement, and thus they should be required to pay no more than what was on that disclosure statement.

Nevertheless, The Money Store continued to insist that the Cardiellos owed monies over and above the amount in the TILA disclosure statement.

JUDGE JACOBS: Are you contending that there is any written statement or disclosure that was made to your client that misstated the terms of the loan in any way?

MR. GROBMAN: Absolutely, the TILA disclosure statement itself. The TILA disclosure statement —

JUDGE JACOBS: Oh, gee, I thought we had taken care of that earlier. The TILA — the original TILA disclosure statement revealed what —

MR. GROBMAN: Sets forth — the TILA disclosure statement sets forth the terms and conditions —

JUDGE JACOBS: Of the underlying —

MR. GROBMAN: — of the requirement between the lender and the borrower.

JUDGE JACOBS: Oh. Well, —

MR. GROBMAN: As long as the — I'm sorry, Your Honor.

JUDGE JACOBS: Yeah. We don't have to get to that, it seems to me, if it — if the TILA disclosure statement back in

'85 accurately reflected what the underlying loan documents said.

MR. GROBMAN: They did accurately —

JUDGE JACOBS: Okay, so —

MR. GROBMAN: They did accurately reflect, as far as we can tell, what the underlying loan documents said.

JUDGE JACOBS: Okay. Now, where —

MR. GROBMAN: However, —

JUDGE JACOBS: So what is — what is the self-concealing statement that they made? What's the false statement that was made?

Now, I understand your contention is that they were seeking money that they weren't owed, or that there was some confusion or mess involving lateness, or timeliness, or whatever. But my question to you is what is the false disclosure that was made.

MR. GROBMAN: Section 1638 of TILA, Your Honor, requires that the lender accurately disclose the total of payments and total finance charge owed, and that it cannot deviate from that, and despite the fact that, as I said, the Cardiellos had adhered to this, starting in May of 2000, The Money Store, for reasons unknown, although reasons that we can suspect because The Money Store was part

JUDGE JACOBS: So the first false statement one has, then, of this is the statement from The Money Store to your clients saying you owe is twenty one hundred dollars. Right?

MR. GROBMAN: In May of 2000. What is the self-concealing part of this, Your Honor?

JUDGE JACOBS: Yeah.

MR. GROBMAN: What are we talking about here? We are talking about a disclosure regarding the total of payments that would be required to be paid at the conclusion of the loan.

JUDGE JACOBS: Now, wouldn't your clients know that they were, under their reading of the facts, being ripped off for two thousand dollars? Wouldn't they know that just by reading the TILA disclosure statement? They would read

MR. GROBMAN: How can they possibly know that, Your Honor? The total —

JUDGE JACOBS: Well, I think that's your argument.

MR. GROBMAN: — of payments relates to the amount that they will pay at the conclusion of the loan. They had adhered to the terms of the TILA disclosure statement

JUDGE JACOBS: Right.

MR. GROBMAN: There was actually absolutely no document in their possession which would give them any indication until they received notification from The Money Store in May of 2000 that somehow The Money Store was going to attempt to deviate from the terms and the conditions contained in the TILA disclosure statement. Absolutely nothing.

JUDGE McLAUGHLIN: Wouldn't the easiest interpretation be that some accountant had screwed up?

MR. GROBMAN: Some accountant had screwed up? Well, as I said, the Cardiellos spent the better part of the next five months attempting to convince The Money Store that they had adhered to the terms of the TILA disclosure statement. And what did The Money Store say? The Money Store said no, you had paid late, a fact, Your Honor, which is patently untrue, as we will prove.

The Cardiellos paid four hundred days early over the course of the loan. There was absolutely no way before May of 2000, as a logical matter, for the Cardiellos to possibly know -and there are no documents in their possession that The Money Store would attempt to deviate from the terms of the TILA disclosure statement.

JUDGE JACOBS: Well, wouldn't it be the easiest way for your client to demonstrate that there — that that two thousand dollar claim was erroneous — wouldn't the easiest way to demonstrate that be to go to the TILA statement and say this is what was disclosed to us at —

MR. GROBMAN: That is exactly

JUDGE JACOBS: — the outset, and this is accurate, this matches what the underlying loan documents say, and that's why we don't owe two thousand dollars?

MR. GROBMAN: That is exactly what we did,

JUDGE JACOBS: So what's —

MR. GROBMAN: — for the better part of five months.

JUDGE JACOBS: So what is the — so what is the lack of disclosure?

MR. GROBMAN: What is the lack of disclosure?

JUDGE JACOBS: Yes.

MR. GROBMAN: The lack of disclosure is the accurate disclosure is the tact that they sought amounts in excess of those disclosed in the TILA disclosure statement.

JUDGE McLAUGHLIN: By mistake,

MR. GROBMAN: Whether by mistake or not — first of all, it is we don't believe it is by mistake. And then when they

were notified of that, section 1640(b) — first of all, this is a strict liability statute, okay? Section 1638 requires them to render an accurate disclosure. It requires them to adhere to that- We strictly adhered to the terms and conditions. In January of 2000 they say you owe twenty one hundred dollars more.

And this is also consistent with, in 1993 there was a Federal Trade Commission action against The Money Store in which some nine thousand borrowers were alleged to have been charged an undisclosed amount of interest, the Cardiellos being one of those people — again, a situation in which these people had absolutely no way of knowing that the disclosures rendered in the TILA disclosure form were erroneous.

This is exactly similar to that case, to that situation, in the Federal Trade Commission.

JUDGE JACOBS: You're not suing for the recovery of the amount of money that concededly was owed to your client, the two hundred ninety three dollars, the check they claim they never got.

MR. GROBMAN: We are suing we are suing, in part, for that, but we are also saying that the improper interest rate calculation, which The Money Store had said that they were going to stop in 1994 in a sworn representation to the Federal Trade Commission – was false. And that is why the Cardiellos allegedly owed amounts in excess — we're not talking about a mistake here. In fact, even to this Court The Money Store continues to insist that the Cardiellos Owed additional amounts because they paid late.

JUDGE JACOBS: On the other hand, they have withdrawn the claim — they have basically — in order to maintain good relations with the Cardiellos, they have dropped their claim even for the remaining hundred sixty four dollars, which they had reduced their claim to.

MR. GROBMAN: Under section 1640(b) — first of all,

TILA does not require any actual damages. Number two, we have a six month attempt on the part of this company, through fraud and misrepresentation, to attempt to collect amounts in excess of those owed.

What is the purpose of the TILA statute? The purpose of the TILA statute is to prevent efforts by lenders to make fraudulent overcharge — overtures to borrowers. Section 1640(b) in particular states —

JUDGE KEITH: What's the fraud here? Counsel, that's disturbing. They made a mistake, and I thought the statute indicated that they should inform the borrower precisely why this money is owing, and did not The Money Store tell your clients look, you were late paying over a certain period of time and this is what happens?

MR. GROBMAN: That's a lie, Your Honor. That is our contention. That is —

JUDGE McLAUGHLIN: It's a mistake. It's a mistake.

MR. GROBMAN: No. It is not. It is not a mistake. They know based on — the same way that I know, they are issued checks, Your Honor. They are issued checks, and that's how and that's how they know whether we paid on time or not. How did we know that we paid four hundred days early? Because we looked at the checks which had been canceled by their bank.

JUDGE McLAUGHLIN: They — they have —

MR. GROBMAN: TILA is not supposed to allow this. Section 1640(b) of TILA says that —

JUDGE McLAUGHLIN: You can't make a mistake.

MR. GROBMAN: No, that in order to avoid TILA liability a lender must, before it receives written notification of that error from the borrower, take steps to correct the error, to

acknowledge the error, and make sure that the borrower pays no more than the total of payments and total amount disclosed under the TILA disclosure statement.

Here we have a situation in which for five months the Cardiellos were attempting to convince them. They eventually had to hire an attorney. The attorney writes them a letter. That is the letter. Sixteen forty (B) says that they have to correct the error before they receive the letter. They did not.

It is a —

JUDGE JACOBS: Before they receive what letter?

MR. GROBMAN: Before they received the June 8th letter from the Cardiellos' attorney telling them that they had made an error. Section 1640(b) says this.

JUDGE JACOBS: You're saying they have to correct the error before they get a letter saying that they made it? I'm afraid I'm losing the thread here.

MR. GROBMAN: Let me — that's exactly what they have to do, Your Honor. It says correction of errors, a creditor or assignee has no liability under this section or section 1607 of this title for any failure to comply with any requirement imposed under this part or party of this subchapter if within sixty days after discovering an error, whether pursuant to a final written examination, or report, or notice, or through the creditor or assignee's own procedures, and prior to the institution of this — of an action under this section, or the receipt of written notice of the error from the obligor, make whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed. It says it right there.

JUDGE McLAUGHLIN: I wouldn't want to parse that sentence.

MR. GROBMAN: Your Honor, it says before the receipt of written notice of the error from the obligor. The point is, Your Honor, TILA is designed to prevent lenders from engaging in fraudulent practices.

JUDGE KEITH: You keep using the word fraud. Couldn't this have just been a mistake?

MR. GROBMAN: No, it cannot, Your Honor. It cannot be a mistake.

JUDGE KEITH: Well, but —

MR. GROBMAN: It cannot be a mistake for them to continue to insist at this point. This is a coverup, Your Honor. It cannot be a mistake for them to continue to insist at this point that we owe money because we paid late. We did not pay late.

JUDGE McLAUGHLIN: But they thought they did.

MR. GROBMAN: Those are our allegations — excuse me?

JUDGE KEITH: The company thought they did pay late.

MR. GROBMAN: But they can't — they can't — they thought it? They can't think it, based on their own — based on their own documents, they thought it

JUDGE McLAUGHLIN: They're misreading their own documents.

MR. GROBMAN: Your Honor, to the extent that TILLA allows a party to engage or to think whatever it wants despite or notwithstanding the documents in their possession, and to engage in any practices or interpretation whatsoever of their documents, in an effort to obtain more than what was disclosed — and I'd also point out — you said that they corrected the error, Your Honor. We do not have to allege

damages under TILA, but as I've said —

JUDGE JACOBS: So what do you get in the way of relief?

MR. GROBMAN: As I've said well, we've got attorneys' fees, okay, and as I've said, the Cardiellos paid over four hundred days early over the course of this loan, The TILA disclosure document says this: early payment will reduce — will result in a reduction of the total payments. They did not waive the amount owed. We are, in fact, entitled to additional amounts.

JUDGE JACOBS: How much?

MR. GROBMAN: I don't know, hundreds.

JUDGE JACOBS: How can you not know? I mean, you just said they have to know exactly how much, you know, —

MR. GROBMAN: Your —

JUDGE McLAUGHLIN: You have the papers. You can't make a mistake,

MR. GROBMAN: No, it's in — it's that is an accountant's determination. We — I don't know what the determination is.

JUDGE McLAUGHLIN: If you have to do it, it's an accountant's fault. When they have to do it, its their fault. This sounds like Enron.

MR. GROBMAN: No. It's —

JUDGE JACOBS: [Laughs] You have reserved some rebuttal. Let's hear from your adversary.

MR. KAMINSKY: Good morning, Your Honors. Martin Kaminsky, Pollack & Kaminsky, for appellee. I think you put your finger on a number of important points here. First of all, there is no TILA violation. They're not claiming the TILA

statement was wrong. What they're complaining about is we allegedly breached their contract by asking them for more money later.

JUDGE JACOBS: Would it be a violation of TILA if The Money Store deliberately, in this case and probably possibly lots of others, simply, when the loan was fully paid off and all the interest fully discharged, sent a letter saying you owe us two thousand, one hundred sixty seven dollars and twelve cents?

Because after all, you know, a certain number of people would just send it in, and then if you lower it to four hundred dollars, you'll get some more four hundred dollar checks, and if you lower it to one fifty six, you'll get some hundred fifty six dollar checks, and in the end if people are really ornery about it, you can say oh, forget the whole thing.

MR. KAMINSKY: It would —

JUDGE JACOBS: Does TILA allow that?

MR. KAMINSKY: That's not a violation of TILA, Your Honor, if you've accurately stated the information in TILA. You may have another claim. You may have a breach of contract claim. You may have a claim even under RESPA. One of the problems in the case —

JUDGE JACOBS: But wouldn't the disclosure -couldn't the letter saying you owe us two thousand, or the letter saying you owe us the hundred fifty, or the letter that says you owe us a hundred fifty six — couldn't that be deemed to be a disclosure or representation subject to TILA that could be false?

MR. KANINSKY: No, Your Honor. TILA talks about disclosures at the time of a loan. TILA was designed to say to you, when you take out your loan, we're going to tell you in plain, simple terms what it is that you're going to be you're going to have to pay, and on what terms you're going to have

to pay.

And incidentally, in this case, TILA did tell them that, accurately, they state. It also told them if they paid late they'd pay more money. Now, there's nothing in the complaint about early charges. This is all stuff that's been added on appeal. This wasn't even added in the court below. But put that aside.

JUDGE JACOBS: Well, doesn't — but the disclosure statement does say that, you know, —

MR. KAMINSKY: Yes.

JUDGE JACOBS: — it will be reduced by early payments.

MR. KAMINSKY: Right, and put that side, though. TILA is talking about what happens at that moment, and that's why there's a short statute of limitations about TILA. Now, there are a lot of other statutes out there that deal with this situation, and there's common law that deals with it. But in terms of the TILA claim, once that accurate statement is given, The Money Store did what they were supposed to do under TILA.

And there is a short statute of limitations for good reason. It's not a fraud kind of statute. It's a pretty direct, emphatic statute. And therefore, there are reasons why Congress said the statement's pretty clear on its face. If you've got some problem with it, you better raise it right away. Now, that's their first claim.

Let me just say one more word about it. I know there's a lot of language out there in other cases about fraudulent concealment and fraudulent equitable tolling. I think if you look at all of those cases, even the Holmberg case in the Supreme Court, there was concealment.

In the Holmberg case, for example, there was a gentleman named Bache who had concealed his ownership of stock.

Therefore, people didn't have a remedy.

I believe that Judge Haight's opinion in a case cited by our adversaries called Meditor, synthesizes this. This circuit has correctly said you need some form of concealment. But TILA — I just want to point that out because the reply brief has a lot of statements quotes a lot of statements out of context, particularly in footnote four of the reply brief. If you look at each of those statements, every one of them involved concealment.

Now, TILA the first claim is TILA, and Judge Jacobs, in our view and I think it's pretty clear from TILA itself — it's talking about what you say in the disclosure statement.

Now, the second claim they have is the one they're complaining about, really. They're saying you came to us and you said we owe you money, and then you didn't give us a real explanation. That's a RESPA claim. That's not a TILA claim. If they — and if we didn't do the right thing, they might have had a claim there. But we did do the right thing.

JUDGE JACOBS: Because you responded within sixty days.

MR. KANINSKY: We responded within twenty days, first, and wrote them, and said look, you're making a mistake here, this is a daily simple interest calculation, by our calculations you still owe us money, but as an accommodation to you, we're going to recalculate it, and we say you only owe us a hundred and sixty eight dollars, again, within the sixty days. Again, within the sixty barely two weeks later, we wrote to them and said you know what, we don't agree with you, but forget it. That complies with RESPA. That's what RESPA's about.

Now, if we didn't do it, and we did what Your Honor said, Judge Jacobs, and we said oh, no, you better pay, and we kept dunning them, and we went after them, then we'd have a real problem under RESPA, and we'd have a problem under a

statute called the Fair Collection of Debts statute, things that are not involved here.

But we did everything right. We — the mere fact that we don't say to Mr. Grobman you know what, you're right, you're absolutely right, we're wrong, doesn't mean we are violating TILA. The mere fact that we don't have to do a mea culpa when we don't believe it TILA. says either say — the statute says disjunctively or either come in and say you know what, we made a mistake, and you're right, and we're correcting it, or explain your difference.

We explained it, but we went even a step farther. Indeed, if you really want to say we had to correct it, waiving the charge certainly corrected it. Mr. Grobman is wrong in referring to section 1640(b). Sixteen forty (b) provides a defense to us. It doesn't provide a new claim.

It says you have a defense if, within sixty days or some period — as Judge McLaughlin said, it's not the easiest words to read — it says it within the time period you go ahead and you correct the mistake, that's a defense, because we recognize that these kind of things are going to happen, particularly in consumer loans, where all of this is automated, things are inputted into the machine, and where the company does what this company did and goes back and looks at the records, that's all you can really ask of them.

There is another claim that they put in here that Your Honors haven't talked about. I'll say just a word about — well, let me first say something about the FTC. The FTC proceeding, as you will see in the record, deals with an entirely different subject. It deals with what's called three sixty five three sixty interest.

Three sixty five three sixty interest is when a bank or a lender charges interest on the basis of a three hundred and sixty day year but the borrower feels that the annual interest amount stated in your loan referred to a three hundred and sixty five day year. That's not what's involved in this case, and that was

a difference of opinion that's still going on. It's being litigated to this day whether that's legal or not.

The Money Store complied with the FTC agreement, but even if it didn't, that's not a TILA violation.

JUDGE JACOBS: Didn't that — did that compliance mean that the interest rate and the amount owed on this loan would have been reduced?

MR. KAMINSKY: It was, Your Honor.

JUDGE JACOBS: Wouldn't that have required a new TILA disclosure at that point?

MR. KAMINSKY: It didn't require one. The way the FTC looked at it was that that was an aspect of the TILA statement that should have been different. As you've seen in the FTC agreement, it specifically says there's no admission or finding of liability. There's nothing of that sort. That's at page A twenty six of the record.

The Money Store decided rather than fight with you, if you think we need to say something more specific about this —

JUDGE JACOBS: You'll calculate —

MR. KAMINSKY: — we'll do it.

JUDGE JACOBS: You'll calculate interest on a different basis.

MR. KAMINSKY: And we'll — and henceforth we'll in all our TILA statements or in our notes we'll say we're using the three sixty five method. That's what The Money Store did do.

THE COURT: So your deal with the government on that did not expressly obviate any need on your part to issue a new TILA statement to your existing borrowers.

MR. KAMINSKY: We continue to argue that the TILA statement was accurate, and the FTC said you know, it doesn't matter, these loans are all some years older, just make sure you change it in the future, and we did change it in the future. But it has nothing to do with what they're talking about. So it's a different question.

Finally, they've raised a question about whether we raised a threat. That was never even pleaded, but as Judge Buchwald correctly said, when you send a letter to somebody and say look, you owe us money, if you don't pay we'll pursue our rights, in a standardized letter and their own complaint pleads that it was a standardized letter.

In paragraph twenty eight of their complaint, at A thirteen, they referred to the first letter they got as a standardized letter. That's not the basis for a claim here.

The Money Store — the bottom line, Your Honors, is The Money Store did what was right here. It promptly responded to them. It looked into the matter. It thought it was correct. But then it waived the matter. That ought to be all that anybody needs to do. There's no evidence of fraud here, Judge Keith. There's not even an allegation of it. And there's certainly no evidence of it.

The letters — the contemporaneous letters that they referred to in their own complaint show that The Money Store acted promptly and in good faith at all times.

JUDGE McLAUGHLIN: Is it your position that if there is a TILA violation it has to occur on the date of the original documents?

MR. KAMINSKY: Yes, and there's a lot of law on that. Yes. And there's — there is a lot of law that says that you can't back door into a TILA violation by saying well, you continued to ask for money, Or you didn't write me a letter three years later and correct it. The violation's on that day, because, as I was saying to Judge Jacobs, Judge McLaughlin,

what the statute is about is tell us at the time of our loan what's going to happen. That doesn't mean you don't have other claims if you go beyond that. Thank you.

MR. GROBMAN: Your Honor, this is a case on a motion to dismiss, not for summary judgment. They claim they complied with the FTC We say they did not. And that's an issue of fact which is palpably improper to determine here.

With regard to their contentions about 1638 and 1640, the idea that the statute of limitations must commence one year from the consummation of the mortgage it makes absolutely no sense The requirement here is that they provide accurate disclosure of the total of payments There is absolutely no way to know what the total of payments or total finance charge is until the conclusion of the loan.

Congress would not impose an affirmative burden on a party to accurately disclose and adhere to statements regarding a total amount, and yet at the —

JUDGE JACOBS: Why can't you figure out at the outset of a loan what the interest rate's going to be, and assuming that every payment is on time and not early, the total amount of money that's going to have to be paid over the life of the loan to discharge it?

MR. GROBMAN: We have a right and they have an obligation to accurately disclose and adhere to the amounts on the TILA disclosure statement. We're talking about a statute of limitations, Your Honor. How could we know —

JUDGE JACOBS: Where do you get the adhere? Where do you get the adhere? They have to disclose it.

MR. GROBMAN: They — yes.

JUDGE JACOBS: Now, according to you, they did disclose what is in the underlying loan documents that your clients signed, and that means that your clients had a very

effective tool to resist an overcharge when they made one, because they had the disclosure statement that said exactly what, indeed, is — that summarized accurately what the transaction terms were.

MR. GROBMAN: So according to that interpretation, Your Honor, TILA is of absolutely no power whatsoever. A lender may make whatever fraudulent attempts it wants to obtain payments in excess of those disclosed

JUDGE JACOBS: I'm not sure I understand how you can say that under TILA one is free to commit fraud, because I think as Judge Keith has elicited from questioning there is no fraud claim in this case. This is a statutory case, and TILA is not a fraud statute.

MR. GROBMAN: Right, but we're —

JUDGE JACOBS: It's a disclosure statute.

MR. GROBMAN: — talking about the statute — we're talking about the statute of limitations. That's the only thing at issue here. What we're talking about are the two conditions under which equitable tolling can apply. One of the conditions is that it is a self-concealing fraud.

No one has advised us as to how the Cardiellos could possibly have known before January of 2000 that The Money Store would attempt to depart from the disclosures made in the TILA disclosure form.

JUDGE KEITH: Well, you keep mentioning fraud, and I'm referring to the letter that was sent, I guess on or about February the 4th, nineteen — and this is what it said, in part:

Although we are under no obligation to do so, in the interest of fostering amicable customer relations, The Money Store has reapplied all of the Cardiellos' payments from the inception of the loan using the letter interest calculation method. As a result of this reapplication, the current balance

of the subject loan is now a hundred and sixty three dollars and twenty one cents, due June the 15th.

So, number one, this vitiates any fraud, but it shows you that there's just been a miscalculation even at this date.

MR. GROBMAN: A miscalculation — we allege that it was based on fraud. We also say, again, 1640(b) —

JUDGE KEITH: Fraud is a strong term, we as lawyers —

MR. GROBMAN: We don't have to prove fraud in order to make out a TILA violation.

JUDGE KEITH: Excuse me, counsel. Excuse me, counsel.

MR. GROBMAN: I'm sorry.

JUDGE KEITH: Fraud is a very strong word, we as lawyers know, in terms of and when you find fraud, you can vitiate almost any type of contractual undertaking that you've gone into. And this letter in itself seems to indicate —look, we have recalculated this, and now we say you owe a hundred and sixty three dollars and twenty one — due June the 15th.

MR. GROBMAN: Over and above the amount disclosed. that hundred and sixty three dollars was still over and above the amount disclosed. Over and above the amount disclosed. They were still, as of June 15th, trying to obtain money over and above the amount disclosed. This smells. They say in the interest of amicable customer relations. This Court has to —

JUDGE JACOBS: They don't seem to have achieved amicable customer relations.

MR. GROBMAN: Section 1640(b), Your Honor, says plainly that they have to make those corrections before they

receive written notice of the error from the borrower. Now, Mr. Kaminsky says no, but that only applies in the first year of the mortgage.

JUDGE JACOBS: He's saying that's a safe harbor for them, and it's not —

MR. GROBMAN: No, but only in the first year, so only in the first year of the mortgage are they required to correct errors. Thereafter there is absolutely no requirement on their part to correct the total amount of payments, at the time when the borrower can first discern that the total amount of payments diverges from the TILA disclosure statement. It would denude TILA of any and all authority.

To the extent that Congress is interested in preventing fraud, if we are correct here — and it will be shown on summary judgment that the whole idea of late payment is not something that is a disagreement. It's something that is palpably plain to any lender.

JUDGE JACOBS: Thank you very —

MR. GROBMAN: Late payment can I just say one thing about RESPA, Your Honor?

JUDGE JACOBS: Just very, very briefly, because —

MR. GROBMAN: Okay.

JUDGE JACOBS: — you're way over time here.

MR. GROBMAN: I'm sorry. They said that RESPA — they complied with RESPA. Again, RESPA says that where a borrower has sent a letter saying we don't owe this amount, RESPA says before taking any action with respect to the inquiry of the borrower.

Twelve days after our inquiry we received a letter from The Money Store that said that unless you immediately pay this

amount in dispute, we are going to commence foreclosure proceedings on your home. Now, what did the district court say? The Congress didn't really mean taking any action. What they meant was any significant action. The authority for that — nowhere. It says taking any action.

JUDGE JACOBS: Thank you very much. Thank you both. We'll reserve decision.

* * * * *

I, KRISTIN M. RUSIN, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled mailer.

Transcript is certified original only if signed in green ink

7/17/02 /s/

00 Civ. 7332 (NRB)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

SAM CARDIELLO and MARIA CARDIELLO, on behalf of themselves and all others similarly situated,
Plaintiff,

- against -

THE MONEY STORE, INC., TMS MORTGAGE, INC., and THE MONEY STORE/EMPIRE STATE INC.,
Defendants.

August 24, 2001, Decided

August 24, 2001, Filed

COUNSEL:
For SAM CARDIELLO, MARIA CARDIELLO, plaintiffs: Neal A. DeYoung, New York, NY.

For Defendants: Martin I Kaminsky, W. Hans Kobelt, Pollack & Kaminsky, NY, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY:
NAOMI REICE BUCHWALD

OPINION:

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs Sam and Maria Cardiello ("plaintiffs" or "Cardiellos") move for reconsideration of this Court's Opinion and Order entered on May 31, 2001 ("Opinion and Order"), n1 dismissing plaintiffs' complaint for failure to state a claim. Pursuant to this Court's Local Rules, a motion for reconsideration can be made "setting forth concisely the matters or controlling decision which counsel believes the court has overlooked." Local Rule 3(j). The only basis for a motion to reconsider is that the court has overlooked matters or controlling decisions which, had they been considered, might have "materially influenced the earlier decision." *Park South Tenants Corp. v. 200 Central Park South Associates, 754 F. Supp. 352, 354 (S.D.N.Y. 1991)* (citing *Caleb & Co. v. E.I. DuPont De Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1984)*, aff'd, *941 F.2d 112 (2d Cir. 1991))*.

We find that plaintiffs have raised no matters or controlling decisions that would have materially influenced our earlier decision. However, we take this opportunity to clarify our opinion in respect to two issues plaintiffs have raised.

First, plaintiffs argue that this Court improperly dismissed their RESPA § 2605 claim *sua sponte*. Specifically, plaintiffs contend that the Court acted *sua sponte* because its analysis of the statute depended, in part, on the construction of the term "action with respect to the inquiry of the borrower," when defendants' motion to dismiss did not focus on that term. However, plaintiffs misconstrue the notion of a court acting *sua sponte*. A court does not act *sue sponte* when it independently engages in analysis or proposes arguments on issues raised in the motion before it. In this case, defendants argued that plaintiffs had failed to state a claim because defendants had complied with RESPA § 2605. This is precisely the ground on which we dismissed plaintiffs' claim.

The fact that we thought it necessary to examine certain statutory terms in greater depth than defendants changes only the focus of the analysis, not the nature of the defense. Clearly, a court's decision is not limited by the precise contours of a party's argument.

Second, plaintiffs argue that in rejecting their "triviality" argument, we improperly relied upon documents not properly before the Court on the motion to dismiss. Specifically, plaintiffs point to our statement.

> In contrast to this hidden condition, evidence of discrepancies between the disclosure statement and the underlying terms of the loan is immediately available by simply comparing the loan documents, disclosure statement and any account statements. Accordingly, courts have consistently held that TILA claims accrue at the time of the loan is made, not when events thrust evidence of the violation in front of plaintiffs' eyes.

Opinion and Order at 16-17. Of course, we recognize that on a motion to dismiss, we cannot rely upon information drawn from anything beyond the four corners of the complaint, documents specifically referenced in the complaint, and subjects of judicial notice, and we have not done so. *Fonte v. Bd. of Managers of Continental Towers, 848 F.2d 24, 25 (2d Cir. 1988).* Rather, this statement was simply a *dicta* argument based on the fact that commercial lenders routinely mail to customers statements of equity and outstanding principal on loans from which plaintiffs could have discovered the alleged inconsistencies. We dismissed plaintiffs' triviality argument on the ground that courts have routinely held that claims for TILA injuries accrue at the time the loans are made.

Accordingly, plaintiffs' motion for reconsideration is denied.

IT IS SO ORDERED.

DATED: New York, New York

August 24, 2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Familiarity with this Court's May 31, 2001, Opinion and Order is assumed.

12 USC § 2605

Section 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by -

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit

Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by -

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust

Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

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For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that -

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall -

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes -

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes -

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of -

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of -

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of -

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include -

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by -

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

15 USC § 1638

Section 1638. Transactions other than under an open end credit plan

(a) Required disclosures by creditor

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(1) The identity of the creditor required to make disclosure.

(2)(A) The "amount financed", using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1) of this section:

(i) take the principal amount of the loan or the cash price less downpayment and trade-in;

(ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by the consumer, including the cost of any items excluded from the finance charge pursuant to section 1605 of this title; and

(iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.

(B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. The statement shall include spaces for a "yes" and "no" indication to be initialed by the consumer to indicate whether the consumer wants a written itemization of the amount financed. Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this

subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:

(i) the amount that is or will be paid directly to the consumer;

(ii) the amount that is or will be credited to the consumer's account to discharge obligations owed to the creditor;

(iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person; and

(iv) the total amount of any charges described in the preceding subparagraph (A)(iii).

(3) The "finance charge", not itemized, using that term.

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.

(5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

(7) In a sale of property or services in which the seller is the creditor required to disclose pursuant to section 1631(b) of this title, the "total sale price", using that term, which shall be the total of the cash price of the property or services, additional charges, and the finance charge.

(8) Descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments", and "total sale price" as specified by the Board. The descriptive explanation of "total sale price" shall include reference to the amount of the downpayment.

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property

not purchased as part of the credit transaction identified by item or type.

(10) Any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge.

(11) A statement indicating whether or not the consumer is entitled to a rebate of any finance charge upon refinancing or prepayment in full pursuant to acceleration or otherwise, if the obligation involves a precomputed finance charge. A statement indicating whether or not a penalty will be imposed in those same circumstances if the obligation involves a finance charge computed from time to time by application of a rate to the unpaid principal balance.

(12) A statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties.

(13) In any residential mortgage transaction, a statement indicating whether a subsequent purchaser or assignee of the consumer may assume the debt obligation on its original terms and conditions.

(14) In the case of any variable interest rate residential mortgage transaction, in disclosures provided at application as prescribed by the Board for a variable rate transaction secured by the consumer's principal dwelling, at the option of the creditor, a statement that the periodic payments may increase or decrease substantially, and the maximum interest rate and payment for a $10,000 loan originated at a recent interest rate, as determined by the Board, assuming the maximum periodic increases in rates and payments under the program, or a historical example illustrating the effects of interest rate changes implemented according to the loan program.

(b) Form and timing of disclosures; residential mortgage transaction requirements

(1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

(2) In the case of a residential mortgage transaction, as defined in section 1602(w) of this title, which is also subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq.), good faith estimates of the disclosures required under subsection (a) of this section shall be made in accordance with regulations of the Board under section 1631(c) of this title before the credit is extended, or shall be delivered or placed in the mail not later than three business days after the creditor receives the consumer's written application, which ever is earlier. If the disclosure statement furnished within three days of the written application contains an annual percentage rate which is subsequently rendered inaccurate within the meaning of section 1606(c) of this title, the creditor shall furnish another statement at the time of settlement or consummation.

(c) Timing of disclosures on unsolicited mailed or telephone purchase orders or loan requests

(1) If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price and the total sale price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

(2) If a creditor receives a request for a loan by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the

creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

(d) Timing of disclosure in cases of an addition of a deferred payment price to an existing outstanding balance

If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addition of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosure required under subsection (a) of this section for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest price shall be deemed first paid for.

15 USC § 1640

Section 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of -

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal

to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material. In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor

required to make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may -

(1) intervene in the action;

(2) upon intervening -

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any

rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter -

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor -

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on suchmodel forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action -

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if -

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

15 USC § 1666d

Section 1666d. Treatment of credit balances

Whenever a credit balance in excess of $1 is created in connection with a consumer credit transaction through (1) transmittal of funds to a creditor in excess of the total balance due on an account, (2) rebates of unearned finance charges or insurance premiums, or (3) amounts otherwise owed to or held for the benefit of an obligor, the creditor shall -

(A) credit the amount of the credit balance to the consumer's account;

(B) refund any part of the amount of the remaining credit balance, upon request of the consumer; and

(C) make a good faith effort to refund to the consumer by cash, check, or money order any part of the amount of the credit balance remaining in the account for more than six months, except that no further action is required in any case in which the consumer's current location is not known by the creditor and cannot be traced through the consumer's last known address or telephone number.

TITLE 12–BANKS AND BANKING

CHAPTER II–FEDERAL RESERVE SYSTEM

PART 226–TRUTH IN LENDING (REGULATION Z)–Table of Contents

Subpart C–Closed-End Credit

Sec. 226.21 Treatment of credit balances.

When a credit balance in excess of $1 is created in connection with a transaction (through transmittal of funds to a creditor in excess of the total balance due on an account, through rebates of unearned finance charges or insurance premiums, or through amounts otherwise owed to or held for the benefit of a consumer), the creditor shall:

(a) Credit the amount of the credit balance to the consumer's account;

(b) Refund any part of the remaining credit balance, upon the written request of the consumer; and

(c) Make a good faith effort to refund to the consumer by cash, check, or money order, or credit to a deposit account of the consumer, any part of the credit balance remaining in the account for more than 6 months, except that no further action is required if the consumer's current location is not known to the creditor and cannot be traced through the consumer's last known address or telephone number.

Supreme Court, U.S.
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No. 02-485

IN THE

Supreme Court of the United States

SAM and MARIA CARDIELLO,

Petitioners,

v.

THE MONEY STORE, INC. and TMS MORTGAGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent The Money Store, Inc. is wholly owned by First Union National Bank.

Respondent TMS Mortgage, Inc. is wholly owned by The Money Store, Inc.

The Money Store/Empire State Inc., a defendant below, was merged into TMS Mortgage, Inc.

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PREFACE

Petitioners ["the Cardiellos"] incorrectly and intemperately criticize the three Court of Appeals Judges and the District Judge who correctly concluded that they do not have a legal claim against Respondents ["The Money Store"]. The District Court thoroughly reviewed and considered the Cardiellos' contentions, and rendered a comprehensive and soundly reasoned decision that is fully consistent with the law and the facts [App. 4a-6a]. The Court of Appeals expressly adopted [App. 2a] that decision on the opinion of the District Court [App. 3a-19a], and adhered to its decision after receiving a lengthy petition for rehearing and rehearing en banc raising the same objections that the Cardiellos raise here [App. 20a-21a].[1]

In simple terms, the case is this:

The Cardiellos, borrowers on a 1985 loan from The Money Store, seek to assert a time-barred claim under the Truth-in-Lending Act and a demonstrably baseless claim against that lender under the Real Estate Settlement Procedures Act, even though The Money Store voluntarily forgave the $2,000 balance they still owed and on which the Cardiellos base their claims. The Money Store continued to believe that it was entitled to the $2,000 balance, and, in its correspondence (sent within RESPA's time requirement), explained why that amount was due. But, when the Cardiellos insisted they should not have to pay, The Money Store chose not to pursue the balance and forgave it, as a courtesy to its customer and to avoid the cost and diversion of corporate energies that a collection action would have entailed. The Cardiellos now say that was not enough. Respectfully, that is not the type of case warranting this Court's intervention, particularly in the face of the unanimous rulings below.

---

1. Citations to "App." refer to the Appendix to the Petition to this Court. Citations to "2d. Cir. Jt. App." refer to the Joint Appendix in the United States Court of Appeals for the Second Circuit.

What the Petition to this Court is really about is that the Cardiellos are angry that The Money Store, believing it did no wrong, "refuse[s] to admit its error" [*see, e.g.*, Petition 17-18], i.e. did not say, in waiving the amount owed, that it agrees with the Cardiellos' version of the situation. For reasons that only they may understand, the Cardiellos do not accept the District Court's sensible conclusion, expressly endorsed by the Second Circuit [App. 15a, 2a], that "it is difficult to imagine a greater accommodation than forgiving the entire amount of a loan in dispute", as occurred here. In any event, as the Courts below found, The Money Store "went far beyond what was required" of it and "certainly" did not violate the law [App. 15a, 2a]. The Cardiellos have not presented a basis for a writ of certiorari. This Court has more important matters to address than the emotions of a disgruntled and undamaged plaintiff who wants an apology from a defendant as to whom both the District Court and Court of Appeals made such findings.

CORRECTION OF STATEMENT OF THE CASE AND FACTS

Correction of Erroneous Factual Statements

The facts are correctly summarized in the District Court's opinion, which the Second Circuit expressly adopted.

In this Court, as they did in the Second Circuit, the Cardiellos make factual allegations that are not contained in their Complaint. For example, attempting to create the misimpression that they were damaged, the Petition says that the Cardiellos are due a refund for supposedly early payments on their loan [Petition 3, 4, 7, 24]. They can give no record cite for that contention since there is no such allegation in their Complaint [cf. Complaint in 2d Cir. Jt. App., A 6 through 23]; and it is contrary to The Money Store's records, which

are in the Record [*see* discussion at App. 3a-6a]. The Cardiellos also cite a section of the Truth-in-Lending Act ["TILA"], § 1666, which they expressly abandoned below when shown that § 1666 refers only to "open-end credits" (e.g. credit cards where continuing loans are made), and *not* to "closed-end credits" (e.g. one-time mortgage loans) like that at issue here [*See* Dist. Ct. Opinion, footnotes 6 and 8, at App. 18a-19a].[2]

The Cardiellos also take improper liberties with the facts. For example, the Cardiellos state that the Federal Trade Commission "had previously found that identical practices by The Money Store in the thousands of borrower's accounts violated § 1638 of TILA" [Petition 22]. There was no such finding. The FTC proceeding was settled; and, in the settlement agreement, the FTC expressly agreed that "the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated" [2d Cir. Jt. App., A 28]. Similarly, the Cardiellos suggest that The Money Store "threaten(ed) foreclosures before investigating whether the amount [was] actually owed" [Petition 2]; whereas, The Money Store's letters to them show the opposite [2d Cir. Jt. App., A 50 through 53].[3]

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2. The distinction between a "closed-end credit" (i.e., a consummated loan, like a mortgage), and an "open-end credit" (i.e., a continuing line of credit, like a credit card) is explained in *Baskin v. G. Fox & Co.*, 550 F. Supp. 64, 66-67 (D. Conn. 1982). Sound case law, detailing the language, legislative history, administrative interpretation and purposes of § 1666, has made clear that § 1666 does not apply to closed-end credits. *Jacobs v. Marine Midland Bank*, 124 Misc. 2d 162, 475 N.Y.S. 2d 1003 (Sup. Ct. Orange Co. 1984); *Bailey v. Capitol Motors, Inc.*, 307 Md. 343, 513 A.2d 912 (Ct. App. 1986).

3. As shown below, the letters were properly part of the record on the motion in the District Court since they had been expressly referred to in the Complaint. *See* Point III *infra*.

The Cardiellos also fail to advise the Court of important facts. The crux of their claim is that The Money Store supposedly imposed charges on them for late payments of their loan. But, their Petition does not mention that they were expressly told, and agreed, that they would incur such charges if their payments were late. Thus, the TILA Disclosure Statement given to and signed by the Cardiellos at the time of their loan stated [2d Cir. Jt. App., A 58]:

> The amounts shown as the finance charge and total of payments are based on the assumption that you will pay the monthly installments when due. Late payment of the monthly installments will increase the finance charge and total of payments . . .

The Cardiellos signed the TILA Disclosure Statement, and initialed changes in it just above the quoted statement. Other contemporaneous evidence also showed that the Cardiellos knew (during the course of their loan) that they would incur additional charges for late payments [*See* Mr. Cardiello's April 1997 letter to The Money Store in 2d Cir. Jt. App., A 59-61].

Further, the Cardiellos do not advise that Court that they expressly acknowledged (in the Second Circuit) that the TILA Disclosure Statement given to them was not misleading. The Cardiellos' counsel expressly conceded that fact in his oral argument [App. 24a]:

> Judge Jacobs: . . . Are you contending that the TILA disclosure statement misrepresented what was in what was written in the underlying loan documents that —
>
> Mr. Grobman: No.

[*see also* App. 23a and 24a where the Cardiellos' counsel further acknowledged that fact].

The Cardiellos also attempt to minimize and misdescribe The Money Store's letters responding to their June 8 request for an explanation of the balance they owed. In two letters (both within the 60-day period required by the Real Estate Settlement Procedures Act ["RESPA"]), The Money Store explained the basis for the balance due [App. 5a-6a, 2a; *see also* 2d Cir. Jt. App., A 50-53]. The Money Store's June 28, 2000 letter explained, consistent with the explicit statement in the TILA Disclosure Statement quoted above, that "the actual principal owed could vary from the amount originally forecast on the disclosure statement if borrowers made late payments" [App. 5a], as the Cardiellos had done [*see also* 2d Cir. Jt. App., A 50-51]. On July 17, 2000, in a follow-up letter (also within the time prescribed by RESPA), The Money Store again explained that but then completely waived the unpaid charge; so that the Cardiellos were not required to pay anything further on their loan [App. 6a; *see also* 2d Cir. Jt. App., A 53]. As the District Court explained [App. 6a]:

> On July 17, 2000, Mr. Winterbottom mailed plaintiffs a 'follow-up' letter. Mr. Winterbottom first addressed plaintiffs' concern about being unable to locate a description of the 'simple interest' method by directing them to the description of the method found on their TILA disclosure statement and apparently enclosing a copy of the statement with the pertinent passage highlighted . . . Finally, 'in the interest of amicable customer relations', The Money Store agreed to waive the remaining balance on plaintiffs' account and release the lien on its secured property.

While the Petition now complains that the letter did not include the Cardiellos' compensation for supposed early payments [Petition 7], their June 8, 2000 letter had not contended that the Cardiellos had paid early and did not

ask for any such refund; and, even more importantly, their Complaint in this action made no such allegation or claim [cf. 2d Cir. Jt. App., A 5 and A 23].

Correction of Erroneous Statements as to Proceedings Below

The Cardiellos' Petition misdescribes and seeks to alter the claims asserted in their Complaint and presented to the District Court. Since those are the only claims properly before the Court, they are summarized here:

The Complaint asserted three types of federal law claims in four "causes of action", demanding damages for the Cardiellos and a class of persons who they contend were similarly wronged [A 9; Complaint ¶10]. Only two of the pleaded claims were pressed on appeal, viz.:

1. A claim (First Cause of Action) that the TILA Disclosure Statement that the Cardiellos received in 1985 at the time of their loan [Complaint ¶18 in 2d Cir. Jt. App., A 12] contained allegedly insufficient or inaccurate disclosures regarding their loan [¶46 in 2d Cir. Jt. App., A 17]; so that The Money Store supposedly violated TILA § 1638, 15 U.S.C. § 1638 and Regulation Z thereunder, 12 C.F.R. § 226.18 [¶46 in 2d Cir. Jt. App., A 17]. The District Court and Court of Appeals found this claim time-barred [App. 7a-12a, 2a]. As noted above, in the Second Circuit, the Cardiellos abandoned their contention that the TILA disclosure statement was misleading.

2. A claim (Second Cause of Action) that The Money Store allegedly failed to respond timely to the June 8, 2000 letter from the Cardiellos, and thus supposedly violated RESPA § 2605. § 2605 required a written response to this letter within 60 days stating *either*: (a) that The Money Store had erroneously made "prior demands for payment" but had now corrected the error; or (b) why The Money Store believed

its calculation of what was due was correct [Complaint ¶51 in 2d Cir. Jt. App., A 18]. The Courts below found, given The Money Store's June 28, 2000 and July 17, 2000 letters in response to the June 8 letter, this claim to be demonstrably baseless [App. 12a-16a, 2a]. The Cardiellos do not raise this claim in their Petition to this Court.

3. and 4. The Cardiellos also asserted (Third and Fourth Causes of Action) that The Money Store allegedly committed a billing error [Complaint ¶52 in 2d Cir. Jt. App., A 18], and wrongfully persisted in improper collection efforts in spite of it [¶¶19-20 in 2d Cir. Jt. App., A 21], supposedly in violation of TILA § 1666, 15 U.S.C. § 1666 [¶¶57, 62 in 2d Cir. Jt. App., A 19-20]. When shown that, as noted above (footnote 2 *supra*), § 1666 applies only to open-end credits not involved here, the Cardiellos dropped those claims [*see* District Court decision at App. 18a n.6].[4]

In the Court of Appeals, the Cardiellos sought to raise two other claims not pleaded in their Complaint, only one of which (raised for the first time on their motion for reconsideration) they seek to raise in this Court, viz.:

1. A new claim (first asserted in seeking reconsideration) that The Money Store's letter threatening foreclosure violated RESPA § 2605(e). This claim is premised on the incorrect allegation that, in *dicta* [App. 16a], the District Court had *sua sponte* raised a defense that The Money Store had not itself raised. What actually happened (as the District Court explained) is that, after noting that it "need not decide here what precisely would constitute" actionable wrongdoing under the statute, the District Court chose to note that "sending standard balance due demand letters alone does not

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4. The Cardiellos also asserted three state law claims. The District Court declined to exercise supplemental jurisdiction over them when it dismissed the federal claims [App. 17a]. The Cardiellos have not appealed that ruling.

constitute" a violation. Moreover, as also noted by the District Court [App. 16a], the letter upon which the Cardiellos base the claim was not one of the letters that responded to their inquiry, which are the only letters to which the statute (by its express terms) applies. That claim is not properly raised on appeal; but, even if it is, it is baseless, and certainly does not warrant review by this Court, for the reasons explained by the District Court; and

2. A claim mentioned in the Cardiellos' papers in opposition to the motion) that The Money Store violated TILA because it allegedly did not comply with its 1991 agreement with the FTC. That claim is apparently not being pressed in this Court. In any event, the claim is baseless since such a claim also would be time-barred and, in any event, involves an obligation not covered by TILA § 1638. TILA § 1638 is a disclosure statute addressing the sufficiency of the disclosures at the time of the loan, not such a post-loan contractual obligation. Moreover, as shown in the papers below, The Money Store did comply with the FTC agreement [App. 11a and 18a n.9; *see also* 2d Cir. Jt. App. A 41-48].[5]

REASONS FOR DENYING THE PETITION

A. *The Criteria for Certiorari Are Not Presented*

The Cardiellos' Petition seeks to obtain review by this Court on matters not raised in their Complaint or otherwise in the District Court. It also misstates what the Courts below held and the effect of those holdings.[6] Thus, a correction on those matters is also needed.

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5. The FTC accepted The Money Store's compliance, and has never raised a question as to it. The Money Store submitted admissible business records showing that it had complied, as the Courts below recognized [App. 11a and 18a n.9].

6. The Cardiellos also take out of context a letter by The Money Store's counsel about the District Court's opinion. Counsel's remarks

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There is no conflict among Circuits. The decisions below do not conflict with or depart from established authority either in this Court or in the Circuits. The District Court and the Second Circuit did not depart from accepted and usual judicial practice. There is no important issue of federal law that needs to be resolved by this Court.

All that is involved here is the unwarranted pique of a borrower (no one else joined their action or has asserted the same claims against The Money Store) because The Money Store, in waiving its right to the money it was owed, did not also say the money was not owed. Respectfully, that is not a proper case for this Court's limited docket.

B. ***Summary of the Correctness of the Decisions Below***

In sum, the answer to the claims that the Cardiellos seek to press in this Court is:

1. The Cardiellos' TILA § 1638 claim, based on the balance they owed on their 1985 loan, was long ago time-barred.[7] Congress expressly included a one-year statute of limitations in TILA for actions under that title. The Cardiellos' Complaint does not allege that the statute of limitations should be equitably tolled, nor any facts upon which such a contention could be based. The documents referred to in the Complaint (and therefore properly considered on the motion to dismiss) showed that the Cardiellos were well aware of

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were about portions of the District Court's opinion as to which the Cardiellos are not petitioning this Court. But, in any event, such remarks would not be the test (and are irrelevant) as to whether certiorari is appropriate.

7. As noted above, the Cardiellos assert this claim even though the TILA Disclosure Statement given to them at the time of the loan expressly explained that they would incur additional charges if they made their payments late.

the underlying facts many years before this action was commenced. Further, there is no basis to equitably toll the statute of limitations. The Cardiellos made no allegation and no showing either that The Money Store affirmatively sought to mislead the Cardiellos as to facts upon which they base their claim or that the alleged wrong was "self-concealing". One of those two alternatives is required. Finally, and in any event, the Cardiellos did not plead any facts showing (as they conceded below is required for equitable tolling) that they used due diligence to learn the facts.

2. The Cardiellos' RESPA claim (alleging that The Money Store's responses to their counsel's June 8, 2000 inquiry letter were untimely and insufficient) is demonstrably baseless,[8] and apparently has been abandoned. The Cardiellos instead contend that The Money Store violated RESPA because it did not acknowledge that (as they contend but The Money Store did not agree) The Money Store was in error when it earlier asked for the balance to be paid. In doing so, the Cardiellos have mischaracterized the facts and incorrectly stated the requirements of RESPA. More to the point, as the Courts below correctly recognized, the Cardiellos are trying to enmesh defendants and the District Court in a class action over, at best, an unduly technical reading of RESPA on the theory that The Money Store's failure to acknowledge wrongdoing when it believed none had been committed is an actionable wrong — despite The Money Store's waiver of the amount due it. Under the Cardiellos' construction of RESPA, a lender who determines not to insist on payment of a small balance owed to it, but who (believing it has done no wrong) does not do a *mea culpa* when waiving the balance,

8. The Cardiellos' Complaint had based this claim primarily on the plainly incorrect assertion that The Money Store had not responded to their counsel's June 8, 2000 letter within the 60-day time period prescribed by RESPA. On appeal, they acknowledged that The Money Store did respond in a timely manner, but sought (as they do here) to recast their claim on different grounds.

should be the subject of a class action seeking to prove the point that the lender determined not to fight over. The Courts below correctly concluded that that is not an appropriate controversy for the over-burdened judicial system.

3. There also is no basis for the Cardiellos' effort to assert a new claim (first raised in their motion for reconsideration) that The Money Store's earlier standardized demand letter (i.e. before waiving the $2,000 balance), stating that it might pursue its legal remedies if the Cardiellos dishonored their contractual obligation, was itself a RESPA violation. No such claim was pleaded; and their contention as to the the statute was not raised below, is internally inconsistent, and contradicts allegations of the Complaint.

POINT I.
THERE IS NO RESPA ISSUE WARRANTING THIS COURT'S REVIEW

A. The Courts Below Correctly Construed and Applied RESPA

In their Petition, the Cardiellos abandon the RESPA claim they had raised in the District Court (i.e. the timeliness of The Money Store's responses to them), and limit their argument to their quibble with the District Court's *dicta* that the sending of a standardized collection letter was not "taking any action" in violation of the statute.

The Cardiellos misstate the statute. It states that a lender must do certain things within the following time period:

> no later than 60 days . . . after receipt from any borrower of any qualified written request . . . *and, if applicable*, before taking any *action with respect to the inquiry* of the borrower . . .

Emphasis added. [App. 53a]. The statute refers to action with respect to the *inquiry*, *not* "any action" with respect to the *loan*.

As the Courts below correctly found [App. 15a], the Cardiellos are not complaining about an action taken "*with respect to the inquiry* of the borrower". Rather, they are complaining that, *apart from* The Money Store's responses to the Cardiellos' June 8, 2000 letter, The Money Store had sent them a standardized letter saying that, if the Cardiellos did not pay what they owed, it would pursue its legal rights [App. 5a]. That letter was not a response to the Cardiellos' letter; and admittedly no steps were taken against the Cardiellos.

This is not a case where, having received a letter of inquiry, a lender hectored a borrower or otherwise acted in bad faith. Rather, barely one week later, The Money Store *did* respond to the Cardiellos' inquiry letter, reflecting that it had investigated their inquiry, explaining why the amount claimed was owing and voluntarily granting an unrequired reduction to the Cardiellos [5a; 2d Cir. Jt. App., A 50-51]. The Money Store followed that letter, also within the 60-day period, with another letter explanation and a full waiver of the amount owed [5a-5b; 2d Cir. Jt. App., A 52-53].

In any event, the Courts below reached a sensible conclusion, viz. the common sense recognition that, under these circumstances, the sending of the interim letter had nothing to do with the Cardiellos' letter of inquiry, was an innocent standard demand letter, and did not rise to the level of action.

The Cardiellos incorrectly ask the Court to engraft onto RESPA § 2605(e)(2) supposed requirements of TILA § 1666, 15 U.S.C. § 1666. TILA § 1666, referring only to open-end credits (not closed-end credits like RESPA), talks about "any *attempt to collect the disputed amount*", *not* action with respect to "*the inquiry*" of the borrower. The Cardiellos had abandoned § 1666 below [*see* App. 18a n.6]. But, in any event, it is directed at a materially different situation than that here. Indeed, the Cardiellos' Petition itself contradictorily acknowledges that "Congress used 'action' elsewhere in

§ 2605(e) to set forth the 'action' a lender must take — i.e. providing written *responses to a borrower's request for information*." (emphasis added). [Petition at 15 n.9]. The Money Store's responses *to* the Cardiellos' *inquiry* letter did *not* threaten foreclosure.

B. RESPA Does Require "Actual Damages" Here

The Money Store, as shown above, did not violate RESPA. But, in any event and in addition, the Courts below correctly also held that the Cardiellos can not assert a RESPA claim since they did not suffer "actual damages". RESPA § 2605(f), 12 U.S.C. § 2605(f)(1)(A), expressly states that an individual borrower can recover only his/her "actual damages" from a violation of RESPA [*see* App. 54a]. Statutory damages absent actual damages are permissible, under the express terms of the statute, only "in the case of a pattern" of violation of RESPA. 12 U.S.C. § 2605(f)(1)(B). The Cardiello Petition attempts to confuse and meld together these two different sections of the statute.

In the Courts below, the Cardiellos contended, incorrectly, that they did have "actual damages"; but, in their Petition to the Court, they have abandoned that incorrect contention.[9]

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9. The Cardiellos contended on the motion below that they suffered "actual damages" since they had hired an attorney; but they never pleaded such damages, and cited no support for their position. The cases they did cite refer to possible damages due to loss of a borrower's credit standing where the lender has reported the borrower's non-payment to a credit bureau [*Cortez v. Keystone Bank, Inc.*, 2000 U.S. Dist. LEXIS 5705 at *39 (E.D. Pa. 2000)] or due to time taken away from work and related expenses other than attorneys' fees [*Rawlings v. Dovenmuehle Mtg., Inc.*, 64 F. Supp. 2d 1156, 1164 (M.D. Ala. 1999)]. Such damages were rejected in *Katz v. Dime Savings Bank*, 992 F. Supp. 250 (W.D.N.Y. 1997) (non-pecuniary damages are not recoverable under RESPA). Even assuming *arguendo*

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Instead, in this Court, the Cardiellos again improperly attempt to inject a new argument. Now, the Cardiellos say that they should get statutory damages (as to which actual damages are not necessary) and that the decisions of the Courts below supposedly conflict with the statute's language allowing statutory damages where a "pattern" of violations is shown [Petition 17]. The Cardiellos did not raise that argument below. Moreover, no such pattern was pleaded or shown. A RESPA "pattern" requires more than a single violation, or even repetitive violations as to the same plaintiff. *Cortez*, 2000 U.S. Dist. LEXIS 5705 at *32 n.12.

In any event, the decisions below did not address the question of statutory damages; thus, there is no basis for the Cardiellos' statement that the holding below "conflicts" with the case law as to statutory damages [Petition at 17]. No issue on that matter requiring or warranting this Court's attention is presented for this Court.

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that this Court would consider such matters to be damages (which The Money Store respectfully submits should not occur), the Cardiellos did not allege them here.

The Cardiellos' pleading of their claim as a class action does not rescue their claim. They have not shown a basis for such a claim. But, in any event, the Cardiellos cannot qualify as class representatives since they themselves were not harmed by the alleged wrongdoing. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 2250-51, 138 L. Ed. 2d at 714 (1997) ("class representative must be part of the class and 'possess the same interest and suffer the same injury as the class members'"); *Lewis v. Casey*, 518 U.S. 343, 354, 116 S. Ct. 2174, 135 L. Ed. 2d 606, 619-20 (1996) (same); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20, 96 S. Ct. 1975, 48 L. Ed. 2d 450 (1976) (same).

C. RESPA Does Not Require a Mea Culpa

The Petition contends, astoundingly, that this Court should hear their case because The Money Store supposedly "refuse[d] to admit its error" in seeking the money it was owed but declined to collect [Petition 17-18]. But, the statute, of course, does not require a mea culpa. It requires *either* "appropriate corrections" *or* an "explanation or clarification" [App. 53a-54a]. Here, The Money Store did both. It "corrected" the balance by deleting it; *and* it explained, in its July 17, 2000 letter and its earlier June 28, 1999 letter, why The Money Store believed its calculations were correct. Either sufficed. *Cortez*, 2000 U.S. Dist. LEXIS 5705, at *32.

It would distort the plain intent of the statute to subject The Money Store to a class action because, although it did what the Cardiellos wished (i.e. forgave the balance due), The Money Store did not also acknowledge that it had made an error when it did not believe it had done so. The salutary purposes of TILA and RESPA do not provide a justification for baseless actions by borrowers who are simply angry that their lenders do not agree with the borrower's view of the situation, especially against lenders who (like The Money Store here) have demonstrably acted in good faith.

POINT II.
THERE IS NO TILA ISSUE WARRANTING THIS COURT'S REVIEW

A. There Is No Issue on the Merits Here

The Cardiellos seek to raise a false issue on the merits. The Second Circuit did make a remark as to the merits [App. 2a]. But, the actual and principal ground for dismissal of the Cardiellos' TILA claim was that it is time-barred; so that the Cardiellos cannot assert a TILA claim even if they had one. However, the evidence on the motion also showed

that, as their counsel in effect admitted to the Second Circuit, the Cardiellos did not and do not have a claim under TILA.

As the Courts below recognized, TILA § 1638 the section at issue, is a disclosure statute, specifying the "required disclosure by [a] creditor" for "transactions other than under an open-end credit plan" [App. 58a]. *Morris v. Lomas and Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989) ("Congress enacted the TILA to ensure meaningful disclosures in consumer-credit transactions"). Accord: *Bartholomew v. Northampton Nat. Bank*, 584 F.2d 1288, 1296 (3d Cir. 1978). Thus, the District Court correctly noted [App. 7a]:

> [T]he Act seeks "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit."

Accord: *In re Ralls*, 230 B.R. 508, 515 (E.D. Pa. 1999). Section 1638 thus refers repeatedly, as the titles of its subsections state, to "disclosures"; and it details (in its several subsections) the "required disclosures", "form and timing of disclosures", etc.

As the District Court noted [App. 12a]:

> Plaintiffs' arguments reflect a basic misunderstanding about the breadth of TILA's application. Although remedial in their purpose, TILA's disclosure requirements are precise in their focus.

Section 1638 is not a catch-all dragnet for every perceived wrong by someone who happens to be a lender. The Cardiellos are improperly attempting to rewrite the statute and extend

it beyond its terms. Respectfully, that is a task (if it is to be done) for Congress, not the Court.[10]

There is no possible dispute that The Money Store complied with that section's requirements here. The Cardiellos' Complaint had alleged that The Money Store's TILA Disclosure Statement was inaccurate and incomplete because it didn't justify the balance that was still due on their loan at the end of its term. That was not so, as their counsel expressly admitted in his argument to the Court of Appeals [App. 23a-24a], quoted above. The TILA Disclosure Statement was not misleading; rather, it had expressly told the Cardiellos that they would incur such additional charges if they made their payments late. That, as The Money Store's letters to the Cardiellos had explained, was the reason why a balance was due from them.

In this Court, as they first did in the Second Circuit, the Cardiellos say that, in actuality, they had paid early and were owed a refund by The Money Store [App. 35a]. There is no such allegation in the Complaint; so that that matter is not properly before the Court. But, in any event, The Money Store's records had shown the opposite [App. 5a-6a]. Thus, the Record in and before the Second Circuit fully supports the conclusion, indeed shows, that no such claim would lie even if pleaded.[11]

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10. Thus, TILA does not apply to the Cardiellos' prior contention (apparently not pressed in the Petition) that The Money Store had failed to comply with its agreement with the FTC. The evidence in the Record shows indisputably that the Cardiellos are factually incorrect. But in any event, TILA does not address compliance with agreements (even with governmental agencies) made several years after a borrower's loan. The FTC Agreement was not, and did not constitute, an extension of credit, much less one for which new TILA disclosures were required.

11. As noted above, contrary to the Petition [p. 22], the FTC did not find that The Money Store had violated TILA § 1638, much

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B. The TILA Claim Is Barred by the Statute of Limitations

TILA § 1640, 15 U.S.C. § 1640, which provides the private right of action for alleged violations of that statute, expressly states (in subpart e thereof) that:

> [A]ny action under this section may be brought . . . within one year from the date of the occurrence of the violation.

15 U.S.C. § 1640(e). That is an explicit unambiguous statute of limitations for any claim asserted under TILA.

A TILA § 1638 claim is based on an allegedly false statement in the TILA Disclosure Statement delivered to a borrower at the closing of the loan. Every court addressing the issue has held that the "date of the occurrence of the violation" for such a claim is the date of the loan. *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 246 (6th Cir. 1980) (TILA one-year statute of limitations runs from the date the loan is made, i.e. "when the promissory note is signed"); *Bartholomew*, 584 F.2d at 1296 (TILA statutory period begins when the loan transaction documents are executed); *Nembhard v. Citibank, N.A.* 1996 U.S. Dist LEXIS 20062 at *5 (S.D.N.Y. 1996) (same); *Morris*, 708 F. Supp. at 1203 (TILA one-year limitations period runs from "the date of the closing"); *Streib v. St. James Bank & Trust Co.*, 642 F. Supp 910, 912 (E.D. La. 1986) ("In a closed-end credit transaction . . . the date of the signing of the promissory note has been held to begin the running of the one-year period"). At bar, that was undeniably in 1985, 15 years before the

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less for the "identical practices" at issue here. The FTC had filed a complaint asserting that The Money Store had violated the statute by charging interest under the 365/360 method, i.e. interest for 365 days under a stated interest rate assuming a 360 day year. That claim was never adjudicated before the FTC or any court. Rather, the parties settled it with an express acknowledgment by the FTC that The Money Store denied any wrongdoing and that the settlement should not and would not be construed as an admission of any wrongdoing.

Cardiellos commenced their action, i.e. 14 years after the statute of limitations had run.

There is no continuing violation, even though the improper disclosure may remain uncorrected. *Rudisell*, 622 F.2d at 246 ("the credit transaction was completed when the Rudisells signed the promissory note."); *Van Pier v. Long Island Sav. Bank*, 20 F. Supp. 2d 535, 538-39 (S.D.N.Y. 1998) (after collecting and quoting decisions: "The case law is clear that the alleged TILA nondisclosure violation here occurred at the time of the loan in 1984, and the alleged continuing failure to provide TILA disclosures is not a 'continuing violation' for purposes of the one-year statute of limitations").[12]

C. The TILA Statute of Limitation Was Not Equitably Tolled

There is no basis, however, for equitable tolling here (as the Courts below correctly held) since the Cardiellos were admittedly on notice of their claim far more than one year before they sued; and, in any event, they did not and could not allege the prerequisites for equitable tolling: namely that they were misled as to their claim and that they did not discover it despite their due diligence to do so.[13]

The required elements of equitable tolling, as summarized in *State of New York v. Hendrickson Bros., Inc.*, 840 F. 2d 1065, 1083 (2d Cir. 1988), are that the plaintiff must show:

> (1) that the defendant concealed from him the existence of his cause of action; (2) that he remained

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12. The Cardiellos'' reliance on TILA § 1640(b) to argue that a violation of TILA § 1638 extends beyond the date of the loan [Petition 24] is incorrect. Subsection b provides an affirmative defense to a lender who, "within 60 days after discovering an error, . . . notifies the person concerned of the error". That is a defense on the merits to a timely claim, not a requirement for determining when the statute of limitations has run.

13. The Cardiellos did not plead that the statute of limitations should be equitably tolled, or any facts supporting equitable tolling.

> in ignorance of that cause of action until some point within [the applicable statutory period] of the commencement of his action; and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

Accord: *Campbell v. The Chandler Assoc., Inc.*, 1997 U.S. Dist. LEXIS 3998 (N.D.N.Y. 1997) (same); *Butala v. Agashiwala*, 916 F. Supp. 314, 319 (S.D.N.Y. 1996) ("the doctrine of fraudulent concealment will not toll the limitations period unless both fraudulent concealment and due diligence are established").

The Cardiellos misleadingly state that "every Federal Circuit holding that equitable tolling applies to TILA has followed *Holmberg* [*v. Ambrecht*, 327 U.S. 392, 397 (1947)] or *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874) both of which conclude that affirmative concealment by the defendant is not required" [Petition 27]. That inaccurately describes the cases and, in any event, addresses only one possible type of the concealment required for equitable tolling. Indeed, as the two cases that the Cardiellos cite themselves show, some form of concealment (either active concealment *or* a self-concealing wrong) is necessary. Both cases dealt with *whether* equitable tolling is available for a TILA claim, *not when* it is. But, in discussing that issue, the Courts of Appeals in both cases expressly recognized that some form of concealment is necessary. Thus, in *Ramedan v. Chase Manhattan Corp.*, 156 F. 3d 499, 502 (3d Cir. 1998), the Court expressly quoted the reference in *Bailey*, 88 U.S. (Wall) at 34, to those two alternative ways of concealment (i.e. either "concealing a fraud, or . . . a fraud . . . that concealed itself"), and further explained that it concluded that equitable tolling should be available in a TILA case since it would be unfair to allow lenders who violate TILA "to avoid liability *if they successfully concealed* the violation from the debtor". 156 F.3d at 502 (emphasis added). The Court of Appeals in *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998), similarly explained that " 'equitable tolling' is the doctrine under which plaintiffs

may sue after the statutory period has expired *if they have been prevented from doing so* due to inequitable circumstances." (emphasis added)[14]

The Cardiellos also incorrectly complain that the Courts below held that, to "invoke" equitable tolling of a statute of limitations, the plaintiff must show that he/she was unable, despite due diligence, to learn of his/her claim *during the statute of limitations period* [Petition 3]. Specifically,

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14. *Holmberg v. Ambrecht*, 327 U.S. 392 (1947) does not stand for the contrary. Although there is language in that opinion that active concealment by the defendant is not necessary for equitable tolling of a statute of limitations, the Court did not address a possible self-concealing wrong. Moreover, the Court's remarks about active concealment are taken out of context by the Cardiellos. There *was* concealment in *Holmberg*. The plaintiffs had sued in equity on behalf of creditors of a defunct bank to collect an assessment due from the shareholders of the bank under the Federal Farm Loan Act. One of the shareholders sued was Charles Ambrecht; but, that case had been dismissed without prejudice on procedural grounds. Later, the plaintiffs learned that Ambrecht was holding stock actually belonging to another shareholder, Jules Bache, and sued Ambrecht and Bache. Bache contended that the statute of limitations and laches barred the action. As this Court expressly noted, "Jules S. Bache had concealed his ownership" of stock in the bank "under the name of Charles Ambrecht", thereby misleading the plaintiffs as to this possible claim for several years. 327 U.S. at 393. Therefore, no issue was presented as to the concealment element of equitable tolling of the statute of limitations. Rather, the issues were whether the statute of limitations applied to the equity claims and whether, in any event, the plaintiffs had exercised the requisite due diligence to warrant an equitable tolling. The Court ruled that fact questions were presented as to the plaintiffs' diligence or lack thereof. 327 U.S. at 396. The remarks on the concealment issue were *dictum*, whose significance must be judged in the context of the facts before the Court. Thus, other courts after *Holmberg*, like those cited above, have made clear that some form of concealment (i.e. either active concealment by the defendant or a self-concealing wrong) is necessary, as well as due diligence by the plaintiff, for there to be an equitable tolling of the statute of limitations.

the Cardiellos argue that it is unfair to have required them to realize they had a possible TILA claim within the first year after the loan (i.e. during the limitations period expressly provided in TILA § 1640) because the additional charges at issue supposedly were not known until the conclusion of the loan [Petition 3]. That misstates the facts, and ignores the law. The TILA Disclosure Statement expressly told the Cardiellos that they would incur additional charges if they were late in making their payments under the loan; thus, the additional charge was not first "disclosed at the loan's conclusion" [cf. Petition 3]. Moreover, it is well settled that the prerequisites for equitable tolling must occur "within the limitations period" itself [*see, e.g., In re Merrill Lynch Ltd. Partnerships Litigation*, 154 F. 3d 56, 60 (2d Cir. 1998)], since, if that were not so, as occurred at bar, the statute of limitations would have already innocently expired *before* there was even a basis to contend that it should be tolled on equitable grounds. This error by the Cardiellos is also the result of their "basic misunderstanding about the breadth of TILA's application" [District Court at App. 12a]. As shown above, TILA § 1638 is directed at disclosure at the time of the loan, not conduct thereafter [App. 8a, 12a]. The Cardiellos persist, nevertheless, in attempting to assert a TILA § 1638 claim on the basis of conduct (not disclosures) long after the loan had closed.

1. ***The Cardiellos were on notice of the basis for their claim*** — As shown below, the Cardiellos were on notice of their potential claim no later than 1992, more than eight years before they commenced this action. The Cardiellos' Complaint itself referred to The Money Store's 1991 agreement with the FTC. Under the FTC Agreement, the Cardiellos had been sent both a refund check and a letter [2d Cir. Jt. App., A 24-25 and A 41-49] advising them:

> We have enclosed a check for you because *you may have been charged more interest on your loan*

> *with The Money Store than you were told.* The Money Store has voluntarily agreed to an order by the Federal Trade Commission that requires the enclosed amount be sent to you.
>
> * * *
>
> If you have any questions about this letter, please call Pearl Turtletaub at the following toll free number: 1-800-221-9741 Ext. 318. Thank you for your attention.

Emphasis added. [2d Cir. Jt. App., A 25 and 49].[15] That plainly put the Cardiellos on notice of the possibility of a claim based on their loan eight years before the action was filed.[16]

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15. Since the FTC Agreement and its contents are referred to in the Complaint, they were properly before the Court and considered on defendants' motion. *See* discussion in Point III *infra*.

16. Although the Cardiellos contended that they did not receive the refund check sent to them as part of the FTC Agreement, the contemporaneous business records of The Money Store show that they did [2d Cir. Jt. App., A 24-25 and 41-48]. As part of the FTC Agreement, The Money Store was required to report to the FTC in 1992 (long before this action) who had and who had not been included in its performance of that agreement. As it reported, the Cardiellos were among the persons who *had* cashed checks and they were *not* among those persons who had received but not cashed checks [2d Cir. Jt. App., A 47-48, 55]. Those documents are admissible business records under Fed. R. Evid. 803(6). *Hardison v. Balboa Insurance Co.*, 4 Fed. App. 663, 669-70 (10th Cir. 2001) (limited citation permissible) (computer cancellation notice, template letter and other such record of mailing admissible business record); *United States v. DeGeorgia*, 420 F.2d 889, 892-93 (9th Cir. 1969) (computer records sufficient to show whether event occurred); *People v. Weinberg*, 183 A.D.2d 932, 933-34 (2d Dept. 1992) (computer print-outs generated after case began from information stored in computer before commencement of case are admissible business records).

Thus, even assuming *arguendo* that there is a basis for equitable tolling here (which, as shown next, is not correct), the Cardiellos' claim is time-barred. *Katz v. Bank of California*, 640 F.2d 1024 (9th Cir. 1981), *cert. denied*, 454 U.S. 860 (1982) (dismissal under TILA one-year statute of limitations where letter had put plaintiff on notice of allegedly undisclosed facts); *Van Pier*, 20 F. Supp. 2d at 540 (no equitable tolling where plaintiff was aware of violation more than one year before action commenced); *Streib*, 642 F. Supp. at 913 (equitable tolling runs from "the date on which the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation"); *In re Woolaghan*, 140 B.R. 377, 382-83 (W.D. Pa. 1992) (no equitable tolling where plaintiffs "had reasonable opportunity to discover the exact nature of their loan").

2. ***There was no concealment*** — The documents referenced in the Complaint showed, beyond dispute, that The Money Store did not actively conceal that borrowers such as the Cardiellos would incur additional interest charges if they were late in making their payments. To the contrary, the TILA Disclosure Statement itself stated that the amounts listed for the monthly payments assume "that you will pay the monthly installments when due" and that "late payment of the monthly installments will increase the finance charge and total of payments . . . " [2d Cir. Jt. App., A 55 and 58].[17] The Cardiellos could also determine that from the payment book and other periodic statements that they admittedly received from The Money Store during the course of their loan. Those facts negated any allegation of active concealment. *Butvin v. Doubleclick, Inc.*, 2000 U.S. Dist. LEXIS 8772 at **20-21 (S.D.N.Y. 2000) (fraud claim that plaintiff was promised unrestricted stock options held time-barred since

17. Further, Mr. Cardiello had written to The Money Store in 1997, three years before this action was filed, showing that he was aware that his late payments would incur the additional charges about which the Cardiellos complain [2d Cir. Jt. App., A 59-61].

other documents received at time of employment had put plaintiff on notice as to restrictions); *Streib*, 642 F. Supp. at 913 (no equitable tolling where borrower had a payment book and had made earlier inquiries regarding other aspects of loan at issue).

3. ***The alleged wrong was not a self-concealing wrong*** — It is and was also clear that this action does not involve a self-concealing wrong. A self-concealing wrong is not shown merely by showing a violation of the statute. As explained in *Pettola v. Nissan Motor Accept. Corp.*, 44 F. Supp. 2d 442, 450 (D. Conn. 1999), citing cases:

> In TILA cases, the courts have held uniformly that fraudulent conduct *beyond* the nondisclosure itself is necessary to equitably toll the running of the statute of limitations. [citations omitted]

Emphasis added. The District Court thus correctly concluded [App. 10a]:

> These holdings make good sense because if the very nondisclosure or misrepresentation that gave rise to the TILA violation also tolled the statute of limitations, the effect of the statute of limitations would be nullified.

Other courts have similarly reasoned. *See, e.g., Hughes v. Cardinal Fed. Sav.*, 566 F. Supp. 834, 838 (S.D. Ohio 1983) ("otherwise, the one-year statute of limitations would be tolled in almost every TILA action in which a non-disclosure violation was found and the statutory limitations provision would be a nullity"). *See also*: *Hentosh v. H.M. Finch University*, 167 F. 3d 1170, 1175 (7th Cir. 1999).

The self-concealing wrong cases cited by the Cardiellos are distinguishable. Unlike a bid-rigging or kickback scheme,

as involved there[18], the alleged wrong at bar is not inherently self-concealing. The Cardiellos also admittedly received monthly and annual statements showing what they had paid and still owed, as corroborated by Mr. Cardiello's 1997 letter. *Streib*, 642 F. Supp. at 913.

4. ***The Cardiellos did not show the requisite due diligence on their part*** — Even assuming *arguendo* that concealment is *not* required for equitable tolling, the Cardiellos have failed to show the other prerequisite of equitable tolling, viz. that they were unable, despite due diligence, to learn of their claim. *Stone v. Williams*, 970 F.2d 1043, 1048-49 (2d Cir. 1992) ("fraudulent concealment does not lessen a plaintiff's duty of diligence" and "plaintiff is charged with whatever knowledge an inquiry would have revealed"); *Bowers v. Transportacion Martina Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990) ("even where concealment exists, the party seeking the benefits of equitable tolling must have acted reasonably to discover the facts and to protect its rights"); *In the Matter of Mtr. of the Mediators, Inc.*, 190 B.R. 515, 525 (S.D.N.Y. 1995) ("to establish the propriety of equitable tolling based on self-concealing fraud, 'plaintiff's due diligence in attempting to discover the fraud is imperative'"); *Billick v. Eagle Elec. Mfg. Co.*, 807 F. Supp.

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18. *Weil v. Long Island Savings Bank*, 77 F. Supp. 2d 313, 326 (E.D.N.Y. 1999), involved a kickback scheme whereby a bank was given a portion of legal fees paid by the borrowers, and thus a wrong beyond an inaccurate disclosure in the TILA Disclosure Statement. *In re Consolidated Insurance Fee Litigation*, 195 F.R.D. 684, 693-94 (N.D. Ala. 2000), involved a fraud scheme to charge borrowers fees that were not being used for the purposes stated in the TILA Disclosure Statement and thus also went beyond the alleged inaccuracy in the TILA Disclosure Statement. It also involved affirmative conduct to cover up the fraud; indeed, the Court there specifically noted that "plaintiff has established that defendants concealed from him the alleged fact that the NSI fee was not being used for the purpose indicated in the loan documents".

243, 254 n.8 (E.D.N.Y. 1992) ("a long series of decisions agree that a plaintiff must *always* show that she acted reasonably to uncover the fraud"). *See also Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1179 (9th Cir. 2000), cited by the Cardiellos, where the Court held that equitable tolling was not appropriate since the plaintiff had "sufficient information to know of the possible existence of a claim", and explaining that to allow otherwise would "trivialize the statute of limitations by promiscuous application of tolling doctrines".

As the District Court correctly explained, the Cardiellos could have determined the basis for their claim by merely comparing the loan documents with their account statements. Indeed, Mr. Cardiello's 1997 letter showed that that is what he was doing. Even ignoring the ease of recognizing the claimed discrepancy between the loan documents and the interest being paid from their account statements, the Cardiellos were undeniably on inquiry notice of their claim in 1992 when they received The Money Store's 1992 letter pursuant to the FTC agreement telling them that they "may have been charged more interest on your loan with The Money Store than you were told" [2d Cir. Jt. App. A 49]. Due diligence required that the Cardiellos follow up on those clear signals promptly. *See, e.g., Butala*, 916 F. Supp. at 318. But, they waited years to file their claim, long after the statute of limitations had run.

POINT III.
THE COURTS BELOW DID NOT USE IMPROPER PROCEDURES

The Cardiellos incorrectly complain that the Courts below followed improper procedures [Petition 29-30]. In actuality, just the opposite was and is true.

The District Court did *not* decide the merits of the TILA claim, and the Second Circuit did not base its affirmance on the merits. Rather, the decisions below as to TILA were based on and fully justified under the TILA statute of limitations. The District Court was entitled to reject allegations in the Complaint that were erroneous legal assertions or demonstrably incorrect factual statements. 5A Wright & Miller, *Federal Practice & Procedure* § 1357 at 315-18 (1990) (the Court need not accept as true "legal conclusions, unsupported conclusions, unwarranted inferences, unwarranted deductions, footless conclusions of law or sweeping legal conclusions cast in the form of factual allegations"); 2 *Moore's Federal Practice*, § 12.34[1][b] at 12.61f and n.13 ("while facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions"); *Bender v. Suburban Hosp. Inc.*, 159 F. 3d 186, 192 (4th Cir. 1998) (rejecting pleaded allegation where other parts of complaint "make it obvious" that the allegation was wrong); *In re Sofamor Danek Group, Inc.*, 123 F. 3d 394, 400 (6th Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998) ("we need not accept as true legal conclusions or unwarranted factual inferences"); *First National Bank v. Gelt Funding Corp.*, 27 F.3d 763, 777 (2d Cir. 1994) (rejecting conclusory allegation based on "faulty" premise since "unwarranted deductions of fact are not [deemed] admitted" on Rule 12(b)(6) motion); *Finkel v. Putnam Convertible Opportunities & Income Trust*, 1997 U.S. Dist. LEXIS 9420 at **10-11 (S.D.N.Y. 1997), *aff'd*, 162 F.3d 1147 (2d Cir. 1998) ("a motion to dismiss does not require courts to ignore contradictions" between the allegations of the

Complaint and facts stated in documents that the Court may consider on the motion).

The Courts below did not rely on matters outside the pleadings. Rather, they followed the sound and established rule that documents referenced in the pleading are deemed part of it on a Rule 12(b)(6) motion. *Cortec Industries Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992) (specifically so holding); *Four Finger Art Factory, Inc. v. Dinicola*, 2000 U.S. Dist. LEXIS 18998 at *4 (S.D.N.Y. Jan. 9, 2001) ("the court may consider" not only "documents referenced in the complaint", but also those "that plaintiff knew of and relied on in bringing suit"). Accord: *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (same); *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (same).

The Courts below did not take "judicial notice" of facts outside the record. Rather, they followed the sound and established rule that a court may consider documents which the Complaint shows are pertinent but which the plaintiff has not made part of it; and it should "decline to close our eyes" to such documents. *I. Meyer Pincus & Assoc. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991); 5 Wright & Miller, *Federal Practice & Procedure* § 1327 at 489 and n.15 (when "plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading"); *Finkel*, 1997 U.S. Dist. LEXIS 9420 at ** 10-11 (same).

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
NOV 5 2002
CLERK

No. 02-485

In the

Supreme Court of the United States

SAM and MARIA CARDIELLO,

Petitioners,

v.

THE MONEY STORE, INC., TMS MORTGAGE, INC., and THE MONEY STORE/EMPIRE STATE INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION

In their initial papers, Petitioners demonstrated that the decision rendered by the Second Circuit significantly undercuts the protections Congress afforded borrowers under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, and the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. § 2605 in numerous fundamental respects:

(1) by concluding that – *despite* RESPA's language prohibiting lenders from "taking any action" before investigating a borrower's claim that an amount demanded by the lender is not owed – lenders are permitted to send letters threatening foreclosure over the disputed amount;

(2) by concluding that -- *despite* the statutory damage remedy afforded by the statute – RESPA requires actual damages to bring a claim;

(3) by concluding that – *despite* RESPA § 2605's language requiring lenders to "notif[y] the person concerned of the error" – a lender may satisfy RESPA without acknowledging its error;

(4) by concluding that – *despite* provisions in TILA prohibiting lenders from charging more than the amount originally disclosed -- claims alleging improper payment demands may routinely be barred by the statute of limitations, since they "accrue at the time loans are made, not upon each payment inconsistent with" the original disclosure; (App. 11a)

(5) by concluding that – *despite* an unbroken line of federal appellate authority to the contrary – equitable tolling cannot apply absent affirmative concealment by the defendant. (App. 10a-11a)

Unable to counter Petitioners' claim that each of these conclusions represents a substantial departure from existing law, Respondents resort to a series of misrepresentations in an effort to divert this Court's attention from the important federal questions at issue. Chief among these efforts is Respondents' repeated claim that it demanded additional amounts from borrowers only "if borrowers made late payments, as the Cardiellos had done." (Brief in Opposition ("Resp. Br."), p. 5) As Petitioners will prove if this case is allowed to move past the pleading stage, this is patently untrue: the Cardiellos did not make late payments – in fact, paid over 400 days early -- as the lenders' own documents showing when Petitioners' payments were received will conclusively demonstrate.

In short, it is respectfully submitted that the assertion that Petitioners owed an additional $2,200 because they had paid late represents nothing less than an attempt by one of America's largest mortgage lenders to conceal widespread overcharges by deliberately misleading this Court.

THE CONSTRUCTION OF RESPA BY THE SECOND CIRCUIT WARRANTS THIS COURT'S REVIEW

The Second Circuit's dismissal of Petitioners' RESPA claims presents three distinct federal issues for review: (1) whether RESPA allows a lender to threaten a borrower with foreclosure before responding to the borrower's claim that the amount demanded was never owed; (2) whether RESPA requires actual damages; and (3) whether a lender can

comply with RESPA by "correcting" the borrower's account while refusing to acknowledge that it made an error.

(i) Letters Threatening Foreclosure

Respondents fail to cite a single authority – none -- which supports the holding that the "before taking any action" language in §2605(e)(2) actually forbids only "significant action" such as the commencement of foreclosure. Attempting to distinguish the interpretation of the virtually identical language in §1666 of TILA -- the statute from which RESPA §2605(e)(2) was modeled -- Respondents misquote the statute, saying it prohibits "any attempt to collect the disputed amount." (Resp. Br., p. 12)

Rather, like §2605(e)(2) of RESPA, §1666 requires a lender to investigate a claim of billing error *"prior to taking any action* to collect the amount."[1] Interpreting this statutory language, this Court found that "the creditor must send its explanation before making any attempt to collect the disputed amount." *American Express v. Koerner,* 452 U.S. 233, 237 (1981) Moreover, in forbidding lenders from "taking any action" in §1666, Congress specifically stated that this language meant that *"creditors cannot send out dunning letters* . . . until the creditor has complied with the requirements for resolving billing inquiries." (Report of the Senate Comm. on Banking, Senate Report No. 93-78, p. 5 (emphasis added))

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[1] As one court explained, the reason RESPA §2605(e)(2) uses different language after "before taking any action" is because "the RESPA borrower inquiry provision applies not only to billing error inquiries but to any request for information. . . while the billing error notice provision of TILA applies only to billing errors." *Cortez v. Keystone Bank,* 2000 WL 536666, *11 (E.D. Pa. 2000)

Neither Respondents nor the Second Circuit offer any basis for interpreting the "before taking any action" language in RESPA's billing error correction provision differently than the same language in the billing error provision in §1666. While Respondents characterize the letter threatening foreclosure as "an innocent standard demand letter", (Resp. Br., p.12), the Senate Report makes clear that that is precisely the type of "action" Congress meant to foreclose until an alleged error has been investigated and responded to by the lender. Since mortgages are not covered by §1666, unless this Court grants Certiorari, millions of borrowers will be left open to such improper threats by lenders demanding payment of amounts which may not be owed.[2]

(ii) The Need for Actual Damages

Other than the holding below, Petitioners are unaware of a single decision under any federal statute regulating the lender/borrower relationship in which actual damages have been held a prerequisite to suit. Nor have Respondents cited any authority supporting the Second Circuit's conclusion.

The claim that Petitioners did not allege a "pattern or practice" of RESPA violations is patently false (See A. 18, ¶ 54 ("Defendants have engaged in a pattern or practice of noncompliance")), as is Respondents' claim that Petitioners "abandoned" their contention that they suffered actual damages in the Petition to this Court. (See Petition, p. 17 n.11 ("Petitioners did suffer damages as a result of the RESPA violation, which forced them to hire an attorney and incur other expenses"))

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[2] Money Store's contention that Petitioners never raised the argument that the letter constituted prohibited "action" below is demonstrably false, as the District Court Opinion demonstrates. App. 15a ("plaintiffs contend that defendants' demands for payment in their letter of June 21, 2000 . . . constituted "taking action" which plaintiffs argue RESPA forbids")

(iii) The Requirement that the Lender Acknowledge the Error

Respondents contend that Petitioners engage in "an unduly technical reading of RESPA" in alleging that, contrary to the Second Circuit's determination that "technical compliance" with §2605 is less important than the "bottom line", lenders must expressly acknowledge an error to avoid RESPA liability. According to Respondents, "the statute does not require a mea culpa." (Resp. Br. at 15)

However, like the courts below, Respondents make no attempt to reconcile this conclusion with the language in §2605(f)(4) requiring servicers to not only make corrections in the account of the borrower to avoid RESPA liability, but also to *"notif[y] the person concerned of the error."*[3] (See App. 55a) Nor do the Respondents dispute that -- once an error in debt calculation is discovered -- both RESPA and TILA require lenders to make corrections in the accounts of all other similarly affected borrowers. (See 15 U.S.C. §§1640(b), 1607(e)(6); 12 U.S.C. § 2605(f)(4))

By de-emphasizing "technical compliance" with RESPA in favor of "the bottom line", the Second Circuit has removed any incentive for lenders to meaningfully investigate and correct mistakes affecting multiple borrowers.

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[3] As did the Second Circuit, Respondents violate a cardinal rule of statutory construction in contending that lenders can comply with §2605(e)(2)*(A)* of RESPA (requiring lenders to correct errors and notify borrowers thereof) by following the separate requirement contained in §2605(e)(2)*(B)* (requiring lenders to explain why no error occurred). It is well settled that in "construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives." *In re Pacific Trading Co.*, 64 F.3d 1292, 1302 (9th Cir. 1995). Thus, "language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause." *Brown v. Budget Rent A Car*, 119 F.3d 922, 924 (11th Cir. 1997).

Just as Money Store is alleged to have done here, lenders may negligently or fraudulently demand substantial additional payments, and as long as they ultimately "waive" the additional amount sought from the complaining borrower, they need not acknowledge their error, much less remedy it in other accounts. As a result, the Second Circuit's holding not only diminishes the ability of borrowers to uncover widespread and systematic errors in customer accounts, but also the possibility that lenders will correct them.

THE CONSTRUCTION OF TILA BY THE SECOND CIRCUIT WARRANTS THIS COURT'S REVIEW

Also at issue is the question of whether, at the maturity of a mortgage loan, TILA permits a lender to demand and collect payments in excess of those originally disclosed without violating the statute. As the Petitioners previously demonstrated, Congress and the Federal Reserve Board clearly appear to prohibit such conduct: §1640(b) of TILA requires lenders to make adjustments in an account "to assure that the person will not be required to pay an amount in excess of the charge actually disclosed", and §1666d[4] of TILA and §226.21 of Reg. Z each require the refunding of excess payments made by a borrower at a mortgage's conclusion.

Nevertheless, ignoring these statutes, the Second Circuit holds that borrowers who are subjected to such excess charges have no TILA remedy. In affirming dismissal of Petitioners' TILA claims on statute of limitations grounds, and in rejecting the TILA claim *sua sponte* on the merits, the Second Circuit adopted the District Court's conclusion that

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[4] Unlike §1666 of TILA, §1666d "applies to any type of credit account, not just open end accounts." (Senate Report 96-73 to P.L. 96-221, p. 20)

"plaintiffs' arguments reflect a basic misunderstanding about the breadth of TILA's application." (App. 12a) According to the Second Circuit, Congress did not "inten[d] . . . to extend TILA liability far beyond the loan transaction itself." (App. 12a) Therefore, the court concluded, TILA claims "accrue at the time loans are made, not upon each payment inconsistent with the [TILA Disclosure] statements terms", and any actions taken by the lender to collect additional amounts at the loan's conclusion "are moot." (App. 11a)

It is impossible to reconcile the Second Circuit's holding with any of the above TILA statutory provisions, and Respondents do not even try. Instead, they seek to insulate the Second Circuit's conclusion from review by claiming that Petitioners did not raise the question of whether Respondents collected amounts in excess of those originally disclosed until they reached the Second Circuit. This argument is baseless. In fact, the June 8, 2000 letter from Petitioners' attorney which Respondents claim "had not contended that the Cardiellos had paid early and did not ask for a refund" (Resp. Br., p. 5) *did precisely that:*

> [T]he Cardiellos have routinely made payments on time, and in fact . . . paid early by a total of 401 days over the course of the loan. Under these circumstances, early payment should have decreased, not increased, the finance charge. (Supplementary App. 1)[5]

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[5] Moreover, Petitioners repeatedly alluded to the issue of excessive payments in their Complaint, and argued the issue before the District Court, which is what led the court to conclude that TILA claims do not accrue "upon each payment inconsistent with the statement's terms." (App. 12a)

With all due respect, Petitioners believe that it is the Second Circuit's conclusion – not Petitioners – which "reflect[s] a misunderstanding about the breadth of TILA's application." (App. 12a) As is evident from §1640(b), §1666d and §226.21, Congress required lenders subject to TILA to not only accurately disclose the total payments to be made at the outset of a Loan, but to *adhere* to those disclosed amounts in their subsequent demands for payment.

Yet the Second Circuit now holds that "TILA claims for inaccurate disclosure statements accrue at the time loans are made, not upon each payment inconsistent with the statement's terms." (App. 11a) The effect of this holding is to make the statutory right to receive a Disclosure Statement accurately reflecting the amount the lender will ultimately demand completely dependent on when the loan occurred. Since, according to the court below, the TILA statute of limitations always expires after a mortgage loan's first year, a lender may deliberately demand "payments inconsistent with the disclosure statement's terms" at any point thereafter, and borrowers like Petitioners will have no TILA remedy.[6]

Neither the Respondents nor the Second Circuit provide any explanation for how this result is consistent with any of the above-referenced statutory provisions or TILA's express purpose of "protect[ing] the consumer against inaccurate and unfair credit practices." 15 U.S.C. §1601.

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[6] Indeed, at oral argument, members of the court questioned whether TILA ever imposes an obligation on the lender to adhere to the payment amounts originally disclosed:

> MR. GROBMAN: We have a right and they have an obligation to accurately disclose and adhere to the amounts on the TILA disclosure statement. . .
> JUDGE JACOBS: Where do you get the adhere? Where do you get the adhere? They have to disclose it. (App. 40a)

THE ISSUE OF IMPROPER PROCEDURES BELOW

With regard to whether the courts below substantially departed from the "accepted and usual course of judicial proceedings" in reaching their determination, Respondents do not dispute that the Second Circuit had no right to decide the merits of the TILA claim under *Singleton v. Wulff*, 96 S.Ct. 2868 (1976), and are left to argue that "the Second Circuit did not base its affirmance on the merits." (Resp. Br., p. 28)

Moreover, in their Brief, Respondents emphasize one of the affirmed "findings" which resulted from what Petitioners have shown to be a patently improper judicial determination:

> As the District Court correctly explained, the Cardiellos could have determined the basis for their claim *by merely comparing the loan documents with their account statements.* (Resp. Br., p. 29 (emphasis added))

As Petitioners advised the Second Circuit on appeal, neither the "loan documents" nor the "account statements" were submitted by Respondents on their Rule 12(b)(6) motion, and indeed the only reference to what they would have shown had they been in the Record was *in the Respondents' Brief.* Thus, Respondents claim that the courts below did not violate *Carter v. Stanton,* 92 S.Ct. 1232, 1234 (1972) in considering these documents but rather followed the "established rule that documents referenced in the pleading are deemed part of it on a Rule 12(b)(6) motion" (Resp. Br. at 29) is meritless, since the account statements and loan documents were *never* referred to in Petitioners' Complaint.

Equally baseless is the Respondents' claim "that the courts below did not take "judicial notice"" of what a comparison of the account statements and loan documents would have shown – a violation of *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) -- but rather followed the "rule that a court may consider documents which the Complaint shows are pertinent but which the plaintiff has not made a part of it." (Resp. Br. at 29) Again, neither the District Court nor the Second Circuit was presented with the account statements or loan documents, and thus were in no position to even refer to, much less make findings on, what a comparison of their contents would have shown. *U.S. v. Boyd,* 289 F.3d 1254, 1258 (10th Cir. 2002), ("if a court takes judicial notice of a fact whose application is in dispute, the court removes the weapons of rebuttal evidence and cross-examination . . . and raises doubt as to whether the parties received a fair hearing")

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,
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CERTIFIED MAIL;
RETURN RECIEPT REQUESTED
The Money Store
PO Box 13716
Sacramento, California 95853-3716

Re: Loan Number 0070294996; Sam & Maria Cardiello 8 Gale Lane, Patchogue, New York 11772-4219

Dear Sirs,

I represent Sam and Maria Cardiello with regard to the above-referenced loan. It is my understanding that, despite the Cardiello's payment of the entire amount indicated in the mortgage, The Money Store alleges that some $2,200.00 remains outstanding on the loan.

It is difficult to understand how you arrived at this determination, since the Cardiellos have routinely made payments on time, and in fact, by my rough estimation, paid early by a total of 401 days over the entire course of the loan. Under these circumstances, early payment should have decreased, not increased, the finance charge.

Under these circumstances, I request a specific detailed explanation for The Money Store's position that money is owed by the Cardiellos.

Very truly yours,

Paul Grobman